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The effect of armed conflict on treaties: an examination of practice and doctrine

Memorandum by the Secretariat

Summary

The present study attempts a comprehensive examination of the effect of armed conflict on treaties, a new topic on the agenda of the International Law Commission. It begins with a theoretical assessment of the issue, including a comprehensive review of previous consideration of the topic, and a discussion of the major difficulties inherent in the study of the topic. These difficulties include (a) diversification of the meaning of the term "armed conflict", making generalization difficult, (b) the increasingly informal nature of modern armed conflict and the resultant decrease in formal declarations by States about the effect on treaties and (c) the delay between an armed conflict itself and when its effects are discussed by courts and political departments.

Two common tests have been developed by courts, commentators, and political departments to determine the effect of armed conflict on treaties: (a) a subjective test of the intention of the parties towards the treaty and (b) an objective test of the compatibility of the treaty with national policy during the armed conflict. Modern consideration of the topic generally uses a combination of the two approaches. These analyses have come to three distinct conclusions. First, the traditional view held that treaties did not survive armed conflict. Second, a diametrically opposed view developed in the early twentieth century maintained that war does not affect treaties, subject to some exceptions. Third, the modern view is embodied in the general statement that armed conflict does not ipso facto terminate or suspend treaties. After an examination of the many exceptions to each view, however, they do not appear to differ drastically.

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The study then engages in a comprehensive categorization of the effect of armed conflict on treaties on the basis of both State practice and doctrine. First, a large group of treaties exhibits a very high likelihood of applicability during armed conflict, including humanitarian law treaties, treaties with express provisions on wartime applicability, treaties regulating a permanent regime or status, treaties or treaty provisions codifying *jus cogens* rules, human rights treaties, treaties governing intergovernmental debt and diplomatic conventions. Second, two kinds of treaties exhibit a moderately high likelihood of applicability: reciprocal inheritance treaties and multilateral "law-making" conventions. Third, a large group of treaties exhibits a varied, emerging or controversial likelihood of applicability, including international transport agreements; environmental treaties; extradition treaties; border-crossing treaties; treaties of friendship, commerce and navigation; intellectual property treaties; and penal transfer treaties. Fourth, two types of treaties have a low likelihood of applicability: treaties with express provisions stipulating they do not apply and treaties which are incompatible in practice with the national policy during the armed conflict.

The effect of the Second World War on treaties is then considered. In addition to the type of treaty, another important factor in determining treaty applicability during armed conflict is the magnitude of the conflict. Thus, an examination of the effect of the Second World War on treaties helps to provide a ceiling of maximum potential effect. Presumably, the lower-magnitude armed conflicts of the modern era would have a correspondingly lesser effect on treaties. When the Second World War is examined in detail, however, it is surprising to note that many fewer treaties were suspended than one might imagine, and perhaps none was completely abrogated.

Publicly available material on modern State practice on the topic is quite limited, but not non-existent. First, there is significant evidence that domestic hostilities in a given State can affect inter-State treaties between that State and another, or potentially even between two or more completely different States. Other non-traditional forms of armed conflict have also been shown to affect treaties, such as the cold war and small bilateral conflicts. Second, although many other legal doctrines have effects that are substantially similar to that of armed conflict on treaties, a strong argument can be made that the latter is distinguishable on the basis that it occurs automatically, whereas doctrines such as *rebus sic stantibus* and impossibility must be invoked. Third, there is strong support for the proposition that operations carried out pursuant to Chapter VII of the Charter of the United Nations will suspend or abrogate inconsistent treaties. Finally, whereas it was traditionally understood that armed conflict had a greater effect on bilateral treaties than on multilateral treaties, there is evidence that this distinction has diminished.

Although significant State practice and doctrine exist, they are inconsistent and in flux. Moreover, as traditional warfare gives way to modern non-traditional, domestic or informal armed conflicts, the parameters of the effect of armed conflict on treaties are left in a state of considerable uncertainty. With input from States as to current governmental views, codification by the International Law Commission could greatly advance international understanding on the topic and update a doctrine which has been written largely for another age.

Contents

		Paragraphs	Page
	Summary		1
I.	Introduction	1–8	4
	A. Nature of the topic	1–2	4
	B. Difficulties inherent in the study of the topic	3–6	5
	C. Past studies of the topic	7–8	7
II.	Theoretical approaches to the topic	9–16	9
	A. Common tests	9–13	9
	B. General conclusions	14–16	12
III.	Categorization of the effect of armed conflict on treaties	17–78	14
	A. Treaties exhibiting a very high likelihood of applicability	18–36	14
	B. Treaties exhibiting a moderately high likelihood of applicability	37–51	26
	C. Treaties exhibiting a varied or emerging likelihood of applicability	52–76	32
	D. Treaties exhibiting a low likelihood of applicability	77–78	47
IV.	The effect of the Second World War on treaties	79–81	48
V.	Modern State practice	82–119	51
	A. Selected countries	82–91	51
	B. Selected armed conflicts after the Second World War	92–119	55
VI.	Relationship of the topic to other legal doctrines	120–142	68
	A. *Rebus sic stantibus*	121–126	68
	B. Circumstances precluding wrongfulness in the law of State responsibility	127–135	71
	C. Necessity and proportionality	136	75
	D. Neutrality	137–138	75
	E. Impossibility of performance	139	76
	F. Martens Clause	140–142	77
VII.	Other contemporary issues	143–159	79
	A. Armed conflict within Chapter VII operations	143–145	79
	B. Domestic hostilities	146–149	80
	C. The distinction between bilateral and multilateral treaties	150–152	82
	D. Separability of particular articles	153–157	83
	E. Length of treaty suspension	158–159	85
VIII.	Conclusion	160–164	86
Annex			
	Bibliography		88

I. Introduction

A. Nature of the topic

1. The effect of armed conflict on treaties has remained an unsettled, unclear area of international law for at least a century. Sir Cecil J. B. Hurst wrote in 1921 that "[t]here are few questions upon which people concerned with the practical application of the rules of international law find the text-books less helpful than that of the effect of war upon treaties in force between belligerents."[1] In the latest major research on the subject, Rapporteur Bengt Broms wrote in his report to the Institut de droit international (IDI) that "[t]he effect of war on treaties has always belonged to the problem areas of international law. It has even been called an 'obscure' topic."[2]

2. Article 73 of the Vienna Convention on the Law of Treaties is clear that it "shall not prejudge any question that may arise in regard to a treaty from ... the outbreak of hostilities between States."[3] The International Law Commission excluded the topic from its draft articles on the law of treaties in 1963 because "[t]he Commission considered that the study of this topic would inevitably involve a consideration of the effect of the provisions of the Charter concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question; and it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties."[4] Moreover, the Commission stated in its commentary on draft article 69, which became Vienna Convention article 73, that it "considered that in the international law of today the outbreak of hostilities between States must be considered as an entirely abnormal condition, and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between

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[1] Cecil J. B. Hurst, *The Effect of War on Treaties*, 2 *British Yearbook of International Law* 37, 38 (1921).

[2] Bengt Broms, *Preliminary Report to the Fifth Commission: The Effects of Armed Conflicts on Treaties*, 59(1) *Annuaire de l'Institut de droit international*, 224, 227 (1981) (citing D. P. O'Connell, *International Law*, v. 1, at 268 (1970)). For perhaps the most pessimistic view in modern scholarship, see Julius Stone, *Legal Controls of International Conflict* 447 (1959) (considering the topic "rather like seeking the principle on which life may be said to continue after death").

[3] Vienna Convention on the Law of Treaties, 1155 *United Nations Treaty Series* 331, art. 73 (23 May 1969). For a history of the drafting debate on article 73, see Richard D. Kearney and Robert E. Dalton, *The Treaty on Treaties*, 64 *American Journal of International Law* 495, 557 (1970); Shabtai Rosenne, *Developments in the Law of Treaties* 1945-1986 at pp. 68-70 (1989). See also Vienna Convention, supra at art. 75 ("The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression").

[4] *Yearbook of the International Law Commission*, fifteenth session, vol. II, p. 189, para. 14 (1963) (reiterated in *Yearbook of the International Law Commission*, seventeenth session, vol. II, p. 176, para. 29 (1966)).

States."[5] Although the article 73 savings clause is cast in very broad language — exempting any treaty question that may arise from the outbreak of hostilities — the present study does not deal with the question of the conclusion of treaties during armed conflict and is limited to the effect of armed conflict on existing treaties.

B. Difficulties inherent in the study of the topic

3. The question of the effect of armed conflict on treaties is a difficult one for several reasons. First, the term "armed conflict" has come to stand for a very diverse set of circumstances. Because each armed conflict involves vastly different circumstances in terms of the magnitude of the conflict, the strength of the treaties involved and the relations of the particular States concerned, it is difficult to formulate rules applicable to all situations. The result of these difficulties is a widely divergent State practice that courts and political departments have treated with justifiable caution.

4. Second, and related, the typical armed conflict has become significantly less formalized. As a result of the prohibition on the use of force in Article 2, paragraph 4, of the Charter of the United Nations, States have moved away from formalized war in the traditional sense towards armed conflicts under the guise of police actions, limited acts of self-defence or humanitarian intervention.[6] Traditional warfare was often accompanied by formal treaty denunciations and was concluded with a peace treaty, which one can use to infer the effect of armed conflict on

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[5] *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.5), vol. III, p. 87 (see also report of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, *Official Records of the General Assembly, Twenty-first Session, Supplement No. 9* (A/6309/Rev.1 (1966)). The Commission's original text for article 69 did not contain the reference to armed conflict. The express reference to armed conflict was added at the Vienna Conference, a combination of amendments by Hungary, Poland and Switzerland, which was adopted by 72 votes to 5, with 14 abstentions. See United Nations Conference on the Law of Treaties: Documents of the Conference, vol. I, pp. 451-52, paras. 9-18 (first session, Vienna, 26 March-24 May 1968) (citing amendment of Hungary and Poland (A/CONF.39/C.1/L.279); amendment of Switzerland (A/CONF.39/C.1/L.359); United Nations Conference on the Law of Treaties: Documents of the Conference, vol. III, p. 199, paras 636-38 (first and second sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969)).

[6] Jost Delbrück, *War, Effect on Treaties, in* 4 *Encyclopedia of International Law* 1367, 1371 (2000) ("A review of the use of military force in the decades following World War II reveals a remarkable shift away from the traditional concept of war as a phenomenon characterized by the formal commencement of hostilities by declaration of war or other action clearly indicating the intention of a State to go to war with another State. Instead, the use of armed force has in many instances gradually developed into a state of war which, however, more often than not has been referred to by governments as a 'police action', a 'limited act of self-defence' or a 'humanitarian intervention', thereby indicating a full-fledged war is not intended to be recognized. In the present context it may well be asked whether such armed conflicts have the same effects on treaties as war does in the above more limited understanding of the traditional concept."); H. W. Verzijl, ed., *International Law in Historical Perspective* 371, 387 (1973) ("The question of whether a particular bilateral treaty had lapsed as a consequence of the outbreak of war could sometimes be left on one side by the court on the ground that no technical state of war had existed between the parties" (citing ILR 1954, p. 262: France-Austria; ILR v. 28, p. 492: France-Romania)).

treaties;[7] modern armed conflict almost always lacks these official proclamations. The informal, lower-magnitude conflicts of the modern era have proved far less likely to generate commentary from courts and political departments than the wars of the past. For example, whereas the *Annuaire français de droit international* included almost yearly entries of French practice on the topic in the aftermath of the Second World War, it has recorded no incident of French practice since 1957.[8] The same is true of the *American Journal of International Law*, which included regular entries on United States practice after the Second World War, but nothing after 1957.[9] Without official declarations from courts or political departments, it is extremely difficult to separate non-performance of a treaty during armed conflict — including potentially justifiable non-performance[10] — from an actual legal effect of armed conflict on the treaty itself.[11]

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[7] One can infer the effect of the armed conflict on pre-war treaties by examining whether the peace treaty provides that pre-war treaties are "revived" or that they "continue in force". But McIntyre notes that even these express provisions "avoided taking a definite stand on the actual effect of war on the treaties and their status while the war was in progress"; Stuart Hull McIntyre, *Legal Effect of World War II on Treaties of the United States* 309 (1958). See also ibid. at 312 ("An examination of the confusing and sometimes contradictory statements of the legal advisers [in the Paris Peace Conference] can lead only to the conclusion that they did not take a definite stand as to the effect of war on the pre-war treaties and were only concerned with what treaties should exist after peace was restored"); ibid. at 313 (arguing that the language of article 289 of the Treaty of Versailles concluding World War II "is ambiguous and can be interpreted to mean either that war terminated those agreements that came to an end or that the Treaty of Versailles itself performed that function"). Several American cases support the view that the war itself terminated the treaties, not the Peace Treaty following it. See ibid. at 316 (clarifying that several American cases discussing the effect of war on treaties "were concerned with the effect of the war itself and not with the status of the treaties under article 289 and the Treaty of Berlin; therefore, what they had to say on treaties not specifically revived was unfortunately only dicta").

[8] 4 *Annuaire français de droit international* 775 (1958) (citing *Dornen Erika c. Batzenschlager*, reported in 4 *Annuaire français de droit international* 128 (1958)).

[9] See 51 *American Journal of International Law* 634 (1957) (discussing *Argento v. Horn*, 241 F. 2d 258 (6th Cir. 1957)). The *Argento* case is discussed infra note 233 and accompanying text.

[10] See infra note 452 and accompanying text.

[11] In the case of non-performance, the treaty is unaffected by armed conflict and legally in force, but States do not perform their obligations under it either because no situation arises where the treaty applies, or because the State breaches its obligations. Professor McIntyre discusses this problem: "In making the assumption that activities based on a treaty bear upon its legal validity, one must avoid inferring from this that the lack of operation necessarily means impairment of the validity of the treaty. In *Artukovic v. Boyle* (1952) Judge Hall stated that evidence indicating that no person had ever been extradited under the extradition treaty of 1901 showed that the treaty was no longer valid. Representative Cannon referred in 1946 to the Permanent Court of Arbitration as 'obsolete', 'defunct', and 'non-existent', since the United States had not made use of the machinery since 1932. But such statements are not well founded. If occasion does not arise for the application of a particular treaty, it cannot be said the treaty has therefore lost its legal validity." McIntyre, supra note 7, at 10 (citing *Artukovic v. Boyle*, 107 F. Supp. 11 (1954); *Hearings on the Third Deficiency Appropriation Bill, 1946, before the House Committee on Appropriations, 79th Cong., 2d Sess.*; Hans Kelsen, General Theory of Law and State 29-47, 118-19 (1946)). McIntyre also cites a decision of the International Military Tribunal in 1946 which "refused to assess punishment against [admirals accused of violating rules of submarine warfare] ... in view of the widespread violation of the rules on both sides. The Tribunal regarded [the rules on submarine warfare] as continuing in force, nonetheless". McIntyre, supra, at 61. Similarly, "defendants before the International Military Tribunal did not argue that the Pact of Paris [the Kellogg-Briand Peace Pact] had ceased to be binding at any time, but did deny that

5. Third, it is very difficult to get a current assessment of the effect of armed conflict on treaties. Political departments are understandably reticent to announce the effect of armed conflicts on treaties when they are currently embroiled in a conflict, and considerable time often passes before the effect of a given armed conflict on a treaty becomes an issue in the judiciary. For example, it was not until 1983 that the British Government declared that the Nootka Sound Convention of 1790 had been terminated in 1795 as a result of war between Britain and Spain, almost 200 years after the fact.[12] Similarly, an Italian court did not rule on the effect of the Second World War on extradition treaties until 1970,[13] and a British court did not assess the effect of the Second World War on the Convention on the Execution of Foreign Arbitral Awards of 1927 until it became an issue in a 1977 case.[14] This lag makes it difficult to assess the effect that new forms of armed conflict are having on treaty relations.

6. As a result, the effect of armed conflict on treaties remains as problematic an area of law as ever before. It has been suggested that codification, although no easy task, would benefit the international community significantly.[15] To that end, the present study attempts a modern summary of doctrine and State practice on the effect of armed conflict on treaties, attempting either to flesh out reliable rules or conclude that none exist. It is meant to serve as a comprehensive summary of the existing public information on the topic. Because of the lack of such publicly available information, however, effective codification will also require submissions from Governments, particularly concerning their practice after the Second World War.

C. Past studies of the topic

7. Many studies on the effect of armed conflict on treaties have been carried out in the past, several of which have been accorded special significance by States and commentators. The first such study was that carried out by the Institute of

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their interpretation of self-defense was in violation of it". Ibid. at 84. See also ibid. at 87 ("The existence of war may be sufficiently incompatible with the nature and purposes of a particular political treaty so that its enforcement during the war proves impossible, but the war may not prevent the continued legal existence of the treaty"); ibid. at 134 (discussing labour treaties during the Second World War and noting that "[f]rom a legal standpoint the obligations and rights of all the members continued as before, but from a practical standpoint some of them were difficult or impossible of [sic] enforcement"); ibid. at 156-57 (noting that many treaties "resulted in such a small degree of activity during World War II it might reasonably be assumed that they were regarded by the member States as in a state of suspension".); ibid. at 353 ("Even though the convention relating to the sovereignty of Norway over Spitsbergen (1920) was violated in some respects in World War II, it continued in force and none of the parties lost their rights under it").

[12] Reported in 54 *British Yearbook of International Law* 370 (1983).

[13] *In re Barnaton Levy and Suster Brucker*, Court of Appeal, Milan (30 October 1970), reported in 1 *Italian Yearbook of International Law* 233 (1975).

[14] 48 *British Yearbook of International Law* 333-35 (1976-77) (citing Case No. I. *Masinimport v. Scottish Mechanical Light Industries Ltd.*, 1976, reported in *Scots Law Times*, p. 245, Outer House, Lord Keith).

[15] See, e.g., Christine M. Chinkin, *Crisis and the Performance of International Agreements: The Outbreak of War in Perspective*, 7 *Yale Journal of World Public Order* 177, 207 (1980-81) ("An authoritative international body should continue work on this incomplete and confused area of the law of international agreements").

International Law in 1912.[16] Second, the Harvard Research on the Law of Treaties of 1935 included a significant analysis of the effect of armed conflict on treaties as part of its more general work on treaties.[17] Third, the Institut de droit international attempted a major study of the topic from 1981 to 1985,[18] culminating in a resolution in 1985.[19] The British Institute of International and Comparative Law has proposed a comprehensive study, aimed at the production of a treatise of over 300 pages on the topic,[20] but the project is temporarily on hold due to resource constraints.[21]

8. Books on the topic have been written by Robert Jacomet in 1909,[22] Harold Tobin in 1933,[23] Lambertus Erades in 1938,[24] Richard Rank in 1949,[25] Stuart McIntyre in 1958,[26] and Agostino Gialdino in 1959.[27] Innumerable treatises discuss the topic,[28] the most significant treatments of the subject appearing in *Oppenheim's*

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[16] *Effects of War Upon Treaties and International Conventions*, 7 *American Journal of International Law* 149 (1912).

[17] Harvard Research in International Law, *Law of Treaties*, 29 *American Journal of International Law*, Supp. 973, 1183-1204 (1935).

[18] 59(1) *Annuaire de l'Institut de droit international* 201-84 (1981); 59(2) *Annuaire de l'Institut de droit international* 175-245 (1981); 61(1) *Annuaire de l'Institut de droit international* 1-27 (1985); 61(2) *Annuaire de l'Institut de droit international* 199-255 (1985) (hereinafter "IDI study at volume, page").

[19] The Effects of Armed Conflicts on Treaties, resolution of the Institut de droit international (Helsinki, 1985), online at http://www.idi-iil.org/idiE/resolutionsE/1985_hel_03_en.PDF (hereinafter "IDI resolution").

[20] *The Effects of War on Treaties, Proposed Study of the British Institute of International and Comparative Law*, online at http://www.areza.com/biicl/index.asp?contentid=69 (accessed 30 September 2004) (noting that the editors of *Oppenheim's International Law*, 9th ed., vol. II (Sir Arthur Watts and Christopher Greenwood) "have not yet begun work on the topic and are content for the Institute to carry out the study").

[21] E-mail exchange with Susan C. Breau, Dorset Fellow in Public International Law and Director of the Commonwealth Legal Advisory Service, British Institute of International and Comparative Law, 22 March 2004.

[22] Robert Jacomet, *La guerre et les traités: étude de droit international et d'histoire diplomatique* (1909).

[23] Harold J. Tobin, *The Termination of Multipartite Treaties* 13-193 (1933).

[24] Lambertus Erades, *De Invloed van Oorlog op de Geldigheid van Verdragen* (Rijksuniversiteit, Leiden, 1938) (An exhaustive 400-page doctoral thesis on the effect of armed conflict on treaties surveying all available provisions governing the issue up to 1938, abundant data on state practice, official Government statements, and case law going back to the seventeenth century. Contrary to the title, the study relates more to the suspension/termination of treaties in armed conflict than to their validity).

[25] Richard Rank, *Einwirkung des Krieges Auf die Nichtpolitischen Staatsverträge* (1949).

[26] McIntyre, supra note 7.

[27] Agostino Curti Gialdino, *Gli Effetti della Guerra sui Trattati* (1959).

[28] See, e.g., *The Law of Nations: Cases, Documents, and Notes* 934-946 (2nd ed., Herbert W. Briggs, ed., 1952); *Akehurst's Modern Introduction to International Law* 145-46 (Peter Malanczuk, ed., 1997); *Starke's International Law* 492-94 (11th ed., I. A. Shearer, ed., 1994); *Principles of Public International Law* 592 (6th ed., Ian Brownlie, ed., 2003); J. G. Starke, *An Introduction to International Law* 408-10 (5th ed., 1963); Rosenne, supra note 3; Anthony Aust, *Modern Treaty Law and Practice* 243-244 (2000); Hans Kelsen, *Principles of International Law* 499-501 (2nd ed., Robert Tucker, ed., 1966).

International Law,[29] *The Encyclopedia of International Law*,[30] Verzijl's *International Law in Historical Perspective*[31] and Marjorie Whiteman's *Digest of International Law*.[32] Significant articles or chapters on the subject have been written by Sir Cecil J. B. Hurst in 1921,[33] Richard Rank in 1952 and 1953,[34] Lord McNair in 1937[35] and 1961[36] and Christine Chinkin in 1981,[37] among many others.[38] The present study will attempt to add to this body of literature,[39] both by incorporating these varied sources into one piece of research and by seeking modern examples not yet discussed elsewhere.

II. Theoretical Approaches to the Topic

A. Common tests

9. Two general schools of thought have developed as to how to approach the effect of armed conflict on treaties. As explained by Starke, "[t]he first is a subjective test of intention — did the signatories of the treaty intend that it should remain binding on the outbreak of war? The second is an objective test — is the execution of the treaty incompatible with the conduct of war?"[40] This section will address each of these schools of thought in turn.

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[29] 2 *Oppenheim's International Law: A Treatise* 302-06 (Hersch Lauterpacht, ed., 7th ed. 1948-52). See also 1 *Oppenheim's International Law* 1310 (Sir Robert Jennings, ed., 9th ed. 1992) (current edition, which includes very little material and refers to 7th edition).

[30] Delbrück, supra note 6, at 1367-73.

[31] Verzijl, supra note 6.

[32] Marjorie M. Whiteman, 14 *Digest of International Law* 490-510 (1970).

[33] Hurst, supra note 1.

[34] Richard Rank, *Modern War and the Validity of Treaties: A Comparative Study (Part I)*, 38 *Cornell Law Quarterly* 321 (1952-53); Richard Rank, *Modern War and the Validity of Treaties (Part II)*, 38 *Cornell Law Quarterly* 511 (1952-53).

[35] Arnold McNair, *Les effets de la guerre sur les traités*, 59 *Recueil des cours* 527 (1937).

[36] Lord McNair, *The Law of Treaties* 695-728 (1961).

[37] Chinkin, supra note 15.

[38] For an exhaustive list of material on the subject, see the annexed bibliography.

[39] Although many of the previous studies deal with the effect of war on treaties, this study adopts the modern trend considering the broader question of the effect of armed conflict on treaties. See Robert Layton, *The Effect of Measures Short of War on Treaties*, 30 *University of Chicago Law Review* 96, 109 (1962-63) ("In the major armed conflicts that have taken place since World War II formal declarations of war have not been issued. The prospects are that this tendency will continue … To a large extent the doctrine of legal, or justifiable, war has been outlawed in the international community. The Charter directs itself to 'threats to the peace, breaches of the peace, and acts of aggression.' In a sense, past concern over the effect of war on treaties may be said to be obsolete. Of course, many of the concepts employed in that inquiry are directly analogous and, provisionally at least, authoritative as to the consequences which may be expected from the outbreak of major hostilities no longer termed war").

[40] Starke, supra note 28, at 409.

10. First, the intention school holds that the effect of armed conflict on treaties should be determined by the intent — either express or implied — of the parties towards those treaties. Proposed by Sir Cecil Hurst in his influential 1922 treatment of the subject,[41] the intention test has been espoused to various degrees by a number of other commentators, including McNair, Borchard, Garner, Rank, Lenoir and Hyde.[42]

11. The second school of thought focuses on the compatibility of the treaty with national policy during armed conflict. This school was born out of dissatisfaction with the intention school in the light of the lack of express provisions on intention, combined with the difficulties inherent in inferring the intention of the parties.[43] Those supporting the compatibility school argue that it can "supplement the intent of the parties when the intent is not readily discernible."[44] The compatibility school has received detailed consideration in several well-known American cases on the effect of armed conflict on treaties. In the case of *Techt v. Hughes*, Justice Cardozo argued that courts should determine the validity of a given treaty provision subject to a dispute before them by examining whether "the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace."[45] This approach was followed by the United States Supreme Court in *Clark v. Allen*, holding that "[w]here the relevant historical sources and the instrument itself give no plain indication that it is to become inoperative in whole or in part on the outbreak of war, we are left to determine, as *Techt v. Hughes*, supra, indicates, whether the provision under which rights are asserted is incompatible with national policy in times of war."[46] This

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[41] Hurst, supra note 1, at 40 ("I submit that just as the duration of contracts between private persons depends on the intention of the parties, so also the duration of treaties between States must depend on the intention of the parties, and that the treaties will survive the outbreak of war or will then disappear, according as the parties intended when they made the treaty that they should so survive or disappear"). The doctrine of intention is also discussed in Rank (Part I), supra note 34, at 325-333.

[42] McIntyre, supra note 7, at 16-17 (citing Arnold McNair, *The Functions and Differing Legal Character of Treaties*, 11 *British Yearbook of International Law* 40 (1921-22); McNair, *La terminaison et dissolution des traités*, 22 *Hague recueil* 511 (1928); Edwin Borchard, *The Effects of War on the Treaty of 1828 with Prussia*, 26 *American Journal of International Law* 528, 585 (1932); Garner, reporter for the Harvard Research on the Law of Treaties, supra note 17, at 1186; Rank, supra note 34 (Part II), at 538; James J. Lenoir, *The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions*, 34 *Georgetown Law Journal* 129, 173 (1946); Charles Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, v. 2, p. 1547 (2nd ed. 1945)).

[43] Professor Myres McDougal, for example, argued it was "'wholly fantastic' to assume that the framers had specific intentions with regard to all future events and that intentions can be accurately interpreted later". McIntyre, supra note 7, at 19 (citing *Lectures Sponsored by the Carnegie Endowment for International Peace: International Law, Power, and Policy* 152 (1952)). McDougal attributes this difficulty to the "great variety of actors (negotiators, drafters, approvers, ratifiers), expressing agreement though verbal forms of all degrees of generality or precision, by all the methods known to international law, for implementation of a great variety of both short-run and long-run objectives and perspectives of their day, and with certain designed and undersigned effects upon the expectations of all the parties and the distribution of values among them". *Carnegie Lectures*, supra.

[44] McIntyre, supra note 7, at 19.

[45] 229 NY 222, 243, 128 NE 185, 192 (1920).

[46] 331 US 503, 513 (1947). See also *Brownell v. San Francisco*, 271 F.2d 974 (Cal. 1954) (following *Clark*).

combination of intention and compatibility has become the standard in the United States of America to measure the effect of armed conflict on treaties.[47]

12. The compatibility doctrine was also espoused at the international level by the dissenting opinion in the *S.S. Wimbledon* case of 1923 in the Permanent Court of International Justice. In that case, Judges Anzilotti and Huber argued that "if duties of national defence or neutrality conflict with those arising from conventions in the field such as commerce and communications, the intention of the parties must have been to treat the latter as being of lesser importance."[48] Finally, the compatibility doctrine has also received support from numerous commentators.[49]

13. Modern thinking on the effect of armed conflict on treaties generally uses a combination of these two approaches. For example, Starke uses the two tests to distinguish six kinds of treaty categories.[50] Other commentators such as McNair,[51]

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[47] McIntyre, supra note 7, at 20, 53. See also Whiteman, supra note 32, at 504 (citing letter from the Department of State to the Department of Justice, 18 March 1949, MS. Department of State, file 311-643/2-949) ("With respect to the effect of war on the operation of treaty provisions generally, the Department considers that the determinative factor is whether or not there is such incompatibility between the treaty provisions in question and the maintenance of a state of war as to make it clear that a given provision should not be enforced."); ibid. at 508 (citing Letter of the Chief of Protocol of the State Department (Woodward) to the Tax Commissioner of Ohio, 29 March 1949, MS. Department of State, file 702.6511 Taxation/2-1949) (using identical language).

[48] Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. 2, pp. 72-73 (1968).

[49] Briggs goes so far as to claim that "the legal right of a belligerent State to ... regard as terminated ... or regard as suspended . . treaties ... incompatible with a state of war" is as well established as the doctrine that treaties containing express provisions on wartime applicability will be honoured. Briggs, supra note 28, at 942-43. See also Delbrück, supra note 6, at 1370 (noting that treaties "in the field of private international law and other treaties regulating private interests" are often unaffected by armed conflict); Aust, supra note 28, at 244 (arguing that "treaties [continue] to apply except in so far as their continuation or operation is not possible during a period of hostilities".); Shearer, supra note 28, at 493. Treaties compatible with national policy during war are alternatively referred to as "non-political" treaties. See, e.g., Whiteman, supra note 32, at 508 (citing letter of the United States State Department Legal Adviser (Gross) to Richard Rank, Svenska Institutet För Internationall Rätt (Iohnson-Institutet), Uppsala, Sweden, 29 January 1948, MS. Department of State, file 500/12-1947).

[50] "1) Treaties between the belligerent states which presuppose the maintenance of common political action or good relations between them, for example, treaties of alliance, are abrogated.

"2) Treaties representing completed situations or intended to set up a permanent state of things, for example, treaties of cession or treaties fixing boundaries, are unaffected by war and continue in force.

"3) Treaties to which the belligerents are parties relating to the conduct of hostilities, for example, the Hague Conventions of 1899 and 1907 and other treaties prescribing rules of warfare, remain binding.

"4) Multilateral Conventions of the 'law-making' type relating to health, drugs, protection of industrial property, etc., are not annulled on the outbreak of war but are either suspended, and revived on the termination of hostilities, or receive even in wartime a partial application.

"5) Sometimes express provisions are inserted in treaties to cover the position on the outbreak of war. ... [These provisions will be honored].

"6) With regard to other classes of treaties, e.g., extradition treaties in the absence of any clear expression of intention otherwise, prima facie these are suspended."

Starke, supra note 28, at 409-10.

[51] See McNair, supra note 36.

Shearer[52] and Verzijl,[53] have created even more classifications. It is one goal of the present study to synthesize all approaches into a comprehensive classification of the effect of armed conflict on treaties.

B. General conclusions

14. Analysis of the effect of armed conflict on treaties has progressed through three distinct conclusions. The traditional view among jurists, confirmed by a large body of traditional State practice, is that treaties did not survive armed conflict.[54] For example, Charles II, King of England and Scotland, informed Scottish judges in 1673 that war with the Dutch "certainly" voided the treaty of Breda.[55] Similarly, in 1801 Lord Stowell "assumed without discussion" in *The Frau Ilsabe* that war between Great Britain and the Netherlands abrogated treaties between them.[56] In 1817, Lord Stowell said treaties "are perishable things, and their obligations are dissipated by the first hostility."[57] United States President Polk stated in 1847 that "[a] state of war abrogates treaties previously existing between the belligerents."[58] Sir J. D. Harding, the Queens Advocate in 1854 Britain, wrote that "by the Law of Nations War abrogates all Treaties between the belligerents."[59] The British blockade of Zanzibar in 1873 was considered by Lord Commissioners of the Admiralty in Britain as an act of war that would annul the Treaty of 1845 between Britain and Zanzibar.[60] After the blockade of Venezuelan ports by Great Britain, Germany and Italy in 1902, Great Britain and Venezuela exchanged formal notes confirming that this blockade "created, ipso facto, a state of war between Great Britain and Venezuela", and as a result there was a need to formally renew and confirm the treaty of 18 April 1825 between them.[61] The United States Court of Claims held in

[52] Shearer, supra note 28, 493.

[53] See Verzijl, supra note 6.

[54] McNair, supra note 36, at 698-702. Noting that "the farther back we go, the more sweeping and undiscriminating are the assertions that all treaties are abrogated by the outbreak of war between the contracting parties", McNair states that "[t]his is probably due to the ancient practice of *diffidatio*, whereby upon the outbreak of war it was customary for each belligerent to proclaim solemnly that all treaties existing between them had thereby ceased. The effect of this practice appears to have survived the practice itself." Ibid. at 698 n. 2 and accompanying text. See also Oppenheim, supra note 29, at 302; Delbrück, supra note 30, at 1369.

[55] McNair, supra note 36, at 698.

[56] Ibid. at 699.

[57] Ibid.

[58] McIntyre, supra note 7, at 34. But see decision of the Claims Commission established under the United States Act of 3 March 1849 ("[A]s a general principle, the breaking out of war puts an end to all treaties between the belligerents, yet it is not universally so. ... [T]he expulsion of citizens of the United States from their places of residence and business in Mexico, during the existence of the late war, before the expiration of the period limited in the treaty, by the public authorities of Mexico, was in violation of their rights secured by treaty."). Ibid.

[59] Ibid. at 700.

[60] Ibid. at 701.

[61] Ibid. at 701-02. American and, to a lesser extent, British case law dealing with the performance of private rights is a major exception to the traditional view. As early as 1823, in *Society for the Propagation of the Gospel v. New Haven and Wheeler*, the United States Supreme Court said in dicta that "treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as the case of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts." 8 Wheaton 464 (discussed in McNair, supra note 36 at 699-700). A British Court reached a similar result seven

1894 that "war supersedes treaties of peace and friendship, and makes the subjects of contending sovereignties enemies in law."[62] The Spanish Government proclaimed in 1898 that the state of war existing between Spain and the United States of America terminated all treaties between them.[63]

15. In the early twentieth century, a second diametrically opposed view emerged that war does not affect treaties, subject to some exceptions. Proposed by N. Politis of France in his report to IDI,[64] the idea was incorporated into the draft regulations adopted by the Institute in its 1912 meeting in Christiana, which stated that war "does not affect the existence of treaties, conventions and agreements, whatever their title or object, between the belligerent States. The same holds for special obligations derived from these treaties, conventions and agreements."[65] Similarly, the Harvard Research on the Law of Treaties in 1935[66] argued that war may suspend some treaties but does not abrogate any of them.[67] This trend away from ipso facto abrogation also received support in an international tribunal of the early twentieth century. The arbitral tribunal in *North Atlantic Coast Fisheries* stated that "[i]nternational Law in its modern development recognizes that a great number of treaty obligations are not annulled by war, but at most suspended by it."[68] At first glance, this school may appear diametrically opposed to the traditional view that war ipso facto terminates treaties; after an examination of the many exceptions to each view, however, they do not appear to differ drastically.

16. The modern view espoused by IDI in its 1985 study and resolution is that "armed conflict does not ipso facto terminate or suspend the operation of treaties in force between the parties to a conflict."[69] Although this broad statement is perhaps

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years later in *Sutton v. Sutton*, 39 Eng.Rep. 255 (1830). These cases form the beginning of a long line of jurisprudence in those countries upholding treaties guaranteeing reciprocal private rights during armed conflict; rather than representative of the traditional view, they are the precursor to the modern view, and are discussed below. United States practice at the conclusion of the War of 1812 between the United States and Britain also differed from the traditional view. John Quincy Adams argued that the Treaty of 1783 between Great Britain and the United States had not been annulled by the War of 1812. Lord Bathurst responded, "To a position of this novel nature Great Britain cannot accede. She knows of no exception to the rule that all treaties are put an end to [sic] by a subsequent war between the same parties." Adams replied that there are "many exceptions" to the absolute termination doctrine, including all treaties which "are in the nature of a perpetual obligation." McIntyre argues that although the United States "may be said to have acquiesced in the British position", strong evidence supports the proposition that the United States never abandoned its point of view and that American practice in the early nineteenth century allowed for major exceptions to the absolute abrogation doctrine. McIntyre, supra note 7, at 29-30 and 30 n. 1.

[62] McIntyre, supra note 7, at 34 (citing *Valk v. United States*, 29 Ct. Cl. 62 (1894), affirmed in 168 US 703 (1897)).

[63] Ibid. at 34.

[64] Ibid. at 37 (citing 24 *Annuaire de l'Institut de droit international* 200 ff (1911)). McIntyre notes that the same view had been proposed three decades earlier in J. C. Bluntschli, *Das Moderne Völkerrecht der Civilisierten Staaten* 538, 402 (1878). The same year Politis made his report, Turkey declared war on Italy and proclaimed all bilateral treaties terminated. Ibid.

[65] Ibid. at 37 (citing 25 *Annuaire de l'Institut de droit international* 611 (1912)).

[66] Harvard Research on the Law of Treaties of 1935, supra note 17.

[67] McIntyre, supra note 7, at 14-15.

[68] *North Atlantic Coast Fisheries*, decision of the arbitral tribunal, RIAA, XI. 167, 181 (7 September 1910) (cited in McNair, supra note 36, at 702 n. 2; Verzijl, supra note 6, at 377).

[69] IDI study, supra note 19, at art. 2. Malanczuk made an interesting point as to the new view that armed conflict does not ipso facto terminate treaties, arguing that "[m]aybe it is not so much the

one of the only common denominators that can be drawn from the vastly divergent practice and doctrine, its overly general nature is unsatisfactory. Section III below will attempt a detailed examination of different types of treaties, in an effort to determine whether any more specific standards can be drawn.

III. Categorization of the effect of armed conflict on treaties

17. The modern view of the effect of armed conflict on treaties is that "the question of whether treaties survive the outbreak of hostilities is resolved according to the type of treaty involved."[70] The task of the modern jurist, therefore, has been to determine which types of treaties continue in force during and after armed conflict, which are suspended and which are abrogated. Judicial decisions in several countries support the categorization theory,[71] and multiple modern commentators have adopted the approach.[72] The present section, the main substantive analysis of the study, attempts a comprehensive examination to this effect.

A. Treaties exhibiting a very high likelihood of applicability

1. Humanitarian law treaties

18. It is well established that armed conflict can have no effect on international humanitarian law (IHL) such as the Geneva and Hague Conventions and

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rule which has changed, as the nature of the treaties to which the rule applies. It was sensible to say that war ended all treaties between belligerent states when most treaties were bilateral 'contract treaties'; the rule has to be altered when many treaties are multilateral 'law-making treaties', to which neutrals as well as belligerents are parties." Malanczuk, supra note 28, at 145-46.

[70] Richard Tarasofsky, *Legal Protection of the Environment during International Armed Conflict*, 24 *Netherlands Yearbook of International Law* 17, 62 (1993).

[71] In Britain see *Sutton v. Sutton*, 39 Eng Rep. 255 (1830). In the United States see *In re Meyer's Estate*, 107 Cal. App. 2d 799, 805 (1951) ("whether the stipulations of a treaty are annulled by war depends upon their intrinsic character"). See also *Clark v. Allen*, 331 US 503 (1947); *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat 464, 494-95 (US 1823); *Karnuth v. U.S.*, 279 US 231 (1929); *Tecia v. Hughes*, 229 NY 222, 128 NE 185 (1920), cert. denied 254 US 643 (1920); *State ex. Rel. Miner v. Reardon*, 120 Kan. 614, 245 Pac. 158 (1926); *Goos v. Brocks*, 117 Neb. 750, 223 NW 13 (1929); *The Sophie Rickmers case*, 45 F.2d 413 (SDNY, 1930).

[72] See *supra* notes 51-53 and accompanying text. But see Verzijl, supra note 6, at 372. Verzijl is critical of this "statistical" approach to the problem, arguing that "even if it were feasible to state with exactitude in how many cases treaties were held to have automatically lapsed as a consequence of the outbreak of war ..., how many were considered as having only become automatically suspended ... and how many remained in force, this numerical result would only be a mere statistical statement of the fact and would not necessarily and automatically imply a corresponding normative judgment. Such a statement would not, to my mind, by itself justify the conclusion that there exists a rule of law in conformity with it, but would at the utmost give an indication of what might be held to be the law in cases where there are no positive data about the intentions of the belligerents available." Ibid. See also ibid. at 377 ("I do not feel ... that there is sufficient foundation for ... a sharp distinction between various groups of treaties, and I do not, therefore, agree with authors who assert that, e.g., commercial treaties do, but extradition treaties do not automatically revive").

Protocols,[73] those treaties dealing with the use of particular weapons[74] and other treaties dealing with aspects of armed conflict[75] since all such treaties were specifically designed to deal with an aspect of armed hostilities.[76] Of all the kinds of treaties discussed in this study, IHL treaties have the highest record of continued vitality during armed conflict. As far back as 1785, article 24 of the treaty of friendship and commerce between Prussia and the United States of America clearly stated that armed conflict had no effect on its humanitarian law provisions,[77] and throughout history even the weakest treaty regimes in international humanitarian law have been "relatively well observed" during armed conflict.[78] The current view

[73] See, e.g., Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, art. 2, 12 August 1949, 75 *United Nations Treaty Series* 31, 6 UST 3114 (hereinafter "Geneva Convention No. I"); Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 2, 12 August 1949, art. 47, 75 *United Nations Treaty Series* 85, 6 UST 3217 (hereinafter "Geneva Convention No. II"); Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, 12 August 1949, 6 UST 3316, 75 *United Nations Treaty Series* 135 (hereinafter "Geneva Convention No. III"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 2, 12 August 1949, 75 *United Nations Treaty Series* 287, 6 UST 3516 (hereinafter "Geneva Convention No. IV"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, arts. 51-56, 1125 *United Nations Treaty Series* 3 (hereinafter "Protocol I"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1, opened for signature 12 December 1977, 1125 *United Nations Treaty Series* 609 (hereinafter "Protocol II"); Convention on the Laws and Customs of War on Land, with annex of regulations, 36 Stat. 2277, 1 Bevans 631 (18 October 1907).

[74] See, e.g., Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1015 *United Nations Treaty Series* 163 (10 April 1972); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1342 *United Nations Treaty Series* 137, 19 ILM 1523 (10 October 1980) (including its five optional protocols); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 *United Nations Treaty Series* 317 (13 January 1993); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997, 2056 *United Nations Treaty Series* 211, 36 ILM 1507 (18 September 1997).

[75] See, e.g., Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, 2187 *United Nations Treaty Series* 90, reprinted in 37 ILM 999 (1998); Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 *United Nations Treaty Series* 215 (14 May 1954) (plus its two protocols); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 *United Nations Treaty Series* 236.

[76] Verzijl, supra note 6, at 371; Delbrück, supra note 6, at 1370; Brownlie, supra note 28, at 592; Whiteman, supra note 32, at 510; Oppenheim, supra note 29, at 304; Aust, supra note 28, at 244; Tobin, supra note 23, at 29; Tucker, supra note 28, at 499-500; Stone, supra note 2, at 447-50; "Study of the legal validity of the undertakings concerning minorities", Commission on Human Rights, sixth session, E/CN.4/367, p. 7, n. 1 (7 April 1950) (hereinafter "United Nations study on minorities"); Starke, supra note 28, at 409.

[77] Treaty of Friendship and Commerce entered into by Prussia and the United States at The Hague, art. 24 (10 September 1785) ("Les deux Puissances Contractantes ont déclaré en outré, que ni le présente que la guerre rompt les Traités, ni tel autre motif quelconque, ne seront censés annuler ou suspender cet Article et le précédent, mais qu'au contraire le temps de la guerre est précisément celui pour lequel ils ont été stipulés") (cited in Verzijl, supra note 6, at 371).

[78] Tarassofsky, supra note 70, at 56 (discussing the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare).

espoused in the *Restatement of the Law, Third, of Foreign Relations Law of the United States* is that "[u]nder traditional international law, the outbreak of war between states terminated or suspended agreements between them. However, ... agreements governing the conduct of hostilities survived, since they were designed for application during war."[79] If this humanitarian exception existed even under the traditional understanding of the effect of armed conflict on treaties, it is even more likely that it exists under the modern approach, which allows for more cases where treaties are unaffected by armed conflict.

19. A similarly significant test is the effect of world wars: whereas world wars have historically had the most significant effects on treaties,[80] humanitarian law continued to operate in the First World War. The Hague Conventions of 1899 and 1907 regulating the conduct of war were treated as in force during the First World War; many Prize Court decisions, as well as the Declaration of Paris of 1856, gave effect to these Conventions.[81] In 1923, the British Government, responding to a query from another Government as to whether it regarded the Geneva Red Cross Convention of 6 July 1906 as still in force between ex-belligerents of the First World War, replied: "[I]n the view of His Majesty's Government this convention, being of a class the object of which is to regulate the conduct of belligerents during war, was not affected by the outbreak of war."[82] Similarly, in 1925 the British Government denounced the 1907 Hague Convention VI, which would not have been necessary if it had been abrogated by the First World War.[83]

20. The vitality of international humanitarian law during armed conflict has also been underscored by the International Court of Justice. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court cited international humanitarian law as the prime example of treaties applicable in armed conflict.[84]

21. Despite this general applicability of international humanitarian law during armed conflict, even this law has a threshold of applicability. Because this threshold may prove relevant to the general question of the effect of armed conflict on treaties, it is discussed in some detail here. Meron explains these thresholds as they relate to international armed conflict, non-international armed conflict and lower-intensity violence not rising to the level of non-international armed conflict:

> "The Geneva Conventions distinguish between international conflicts, as defined in common Article 2, and conflicts not of an international character under common Article 3. Conflicts involving lower-intensity violence that do not reach the threshold of an armed conflict are implicitly distinguished from

[79] *Restatement of the Law, Third, Foreign Relations Law of the United States*, American Law Institute, § 336(e) (1987) (hereinafter "*Restatement 3d*").

[80] See infra section IV.

[81] McNair, supra *note* 36, at 696. See also ibid. at 704.

[82] McNair, supra note 36, at 704.

[83] Ibid.

[84] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at para. 105 (8 July 1996). The Court also makes clear that any treaty codifying the principle of neutrality would also continue to apply: "The Court finds that as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used." Ibid. at para. 89.

noninternational armed conflicts to which the provisions of that article are applicable. Article 8(2)(d) of the Rome Statute of the International Criminal Court, drawing on the language of Article 1(2) of Additional Protocol II, makes this distinction explicit for the purposes of this statute by providing that paragraph 2(c), which tracks the language of common Article 3, applies to armed conflicts and not to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature. The Additional Protocols distinguish between international armed conflicts as defined in Article 1 of Protocol I, noninternational armed conflicts as defined in Article 1 of Protocol II, and 'situations of internal disturbances and tensions', which fall below the threshold of applicability of Protocol II. Article 8(2)(f) of the ICC statute has further complicated the question. It declares that the provisions in paragraph 2(e), which go beyond common Article 3 and include some additional Geneva and Hague law, 'apply to armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups.'"[85]

22. Because "the characterization of the conflict ... determines which rules of international humanitarian law, if any, will be applicable", the door is open for Governments to characterize the conflict in the way most favourable to them, potentially decreasing the applicability of international humanitarian law.[86] This problem is exacerbated by the extent of "'mixed' or 'internationalized' conflicts" characteristic of the current era.[87] The non-application of the whole of international humanitarian law to non-international armed conflict is particularly problematic because the Protocol dealing specifically with non-international armed conflict, Protocol II, requires a very high threshold to trigger its applicability and has seldom been applied.[88] Thus, the characterization of the armed conflict as a non-international one can have the effect of rendering all humanitarian law inapplicable.[89]

23. This trend separating different thresholds of applicability of IHL appears to be dissipating. A recent study by the International Committee of the Red Cross "seeks a broader recognition that many rules are applicable to both international and non-international conflicts."[90] Most military manuals do not distinguish between the two, and the Chairman of the United States Joint Chiefs of Staff explicitly states that the "Armed forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however

[85] Theodor Meron, *The Humanization of Humanitarian Law*, 94 *American Journal of International Law* 239 (2000) (citing humanitarian law treaties, supra note 76).

[86] Meron, supra note 85, at 260-61.

[87] Ibid.

[88] Ibid. at 261.

[89] Ibid. (citing Richard R. Baxter, *Some Existing Problems of Humanitarian Law*, in The Concept of International Armed Conflict: Further Outlook 1, 2 (Proceedings of the International Symposium on Humanitarian Law, Brussels (1974)). Similar to this characterization issue, Meron also discusses how the redefinition of "protected persons" under article 4 of the Fourth Geneva Convention can lead to non-applicability of that convention in armed conflicts in which it should otherwise apply. See Meron, supra at 256-60.

[90] Meron, supra note 85, at 261.

such conflicts are characterized."[91] The regulations promulgated by the United Nations Secretary-General regarding the observance of IHL by United Nations forces also make no distinction between international and non-international conflicts.[92] A growing number of new IHL conventions apply to non-international conflicts.[93] Moreover, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has strongly questioned the distinction between international and non-international armed conflict:

> "Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight."[94]

24. Finally, Meron notes that "the codification in the ICC statute of the principles that crimes against humanity can be committed in all situations, without regard to the thresholds of armed conflicts, and that they can be committed not only in furtherance of state policy, but also in furtherance of the policy of non-state entities, is a signal achievement."[95] Thus, although IHL has historically enjoyed only limited applicability during non-international or non-State armed conflict, the recent trend is a clear break from this tradition.

25. Another area in which an examination of IHL can prove useful to the general question of the effect of armed conflict on treaties is in the distinction between treaty violation, on the one hand, and the legal effect of armed conflict on treaties, on the other hand. For example, although it is well established that international armed conflict has ostensibly no effect on IHL,[96] and the extent to which IHL

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[91] Ibid. (citing Chairman, Joint Chiefs of Staff, Instruction 5810.01, *Implementation of the DOD Law of War Program* (1996), cited in Corn, *When Does the Law of War Apply? Analysis of Department of Defense Policy on Application of the Law of War*, in Army Law 17 (1998)).

[92] Ibid. at 261-62 (citing ST/SGB 1999/13, reprinted in 38 ILM 1656 (1999)).

[93] Ibid. at 262 (citing Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, opened for signature 10 April 1981, 1342 *United Nations Treaty Series* 162, 19 ILM 1523 (1980); Protocol [II] on Mines, Booby-Traps and Other Devices, 3 May 1996, 2045 *United Nations Treaty Series* 137, 35 ILM 1206 (1996); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997, 2056 *United Nations Treaty Series* 241, 36 ILM 1507 (1997); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972, 1015 *United Nations Treaty Series* 163, 26 UST 583; Convention on the Prohibition of the Development, Production, 1974 *United Nations Treaty Series* 317 and Use of Chemical Weapons and on Their Destruction, 13 January 1993, S. Treaty Doc. No. 21, 103d Cong. (1993), 32 ILM 800 (1993); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, art. 22, 38 ILM 769 (1999)).

[94] *Prosecutor v. Tadic*, No. IT-94-1-A72, Appeal on Jurisdiction, para. 97 (2 October 1995), reprinted in 35 ILM 32 (1996) (cited in Meron, supra note 85, at 262).

[95] Meron, supra note 85, at 263.

[96] See supra notes 76-84 and accompanying text.

applies during non-international conflict is increasing,[97] a review of State practice nevertheless reveals many cases where IHL, although it applied, was violated. In Bosnia, Kosovo, Sierra Leone, the Congo, Somalia, Afghanistan, Cambodia, Kuwait and elsewhere, the "contrast between the normative framework and the harsh, often barbaric reality of the battlefield" is bitterly apparent.[98] The United Nations Secretary-General recognized this dichotomy in a recent report to the Security Council:

> "Despite the adoption of the various conventions on international humanitarian and human rights law over the past 50 years, hardly a day goes by where we are not presented with evidence of the intimidation, brutalization, torture and killing of helpless civilians in situations of armed conflict. Whether it is mutilations in Sierra Leone, genocide in Rwanda, ethnic cleansing in the Balkans or disappearances in Latin America, the parties to conflicts have acted with deliberate indifference to those conventions. Rebel factions, opposition fighters and Government forces continue to target innocent civilians with alarming frequency."[99]

Similarly, the International Committee of the Red Cross states that "[s]adly, there are countless examples of violation of international humanitarian law."[100] Thus, a clear distinction exists between the effect of armed conflict on treaties, on the one hand, and treaty violation, on the other hand. Because IHL unquestionably applies during armed conflict, it is easy to separate a legal effect of armed conflict on IHL (there is none) from a violation of IHL by the parties to the conflict. With other treaties whose status during armed conflict is less clear, the two become more difficult to separate, and one should take care not to mistake treaty violation as evidence of an effect of armed conflict on that treaty.

2. Treaties containing express provisions on wartime applicability

26. Treaty provisions expressly confirming the applicability of the treaty during armed conflict or war will generally be honoured.[101] For example, the British Government continued to pay Russia loan payments despite the outbreak of war between the two parties because the treaty establishing the loan, the Convention of 19 May 1815, expressly provided that such payments should continue during times

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[97] See supra notes 90-95 and accompanying text.

[98] Meron, supra note 85, at 276.

[99] S/1999/957, para. 2 (cited in Meron, supra note 85, at 277).

[100] International Committee of the Red Cross, *What is International Humanitarian Law?* Advisory Service on International Humanitarian Law, online at http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNXM/$FILE/What_is_IHL.pdf.

[101] See commentary on article 21 of the articles on the responsibility of States for internationally wrongful acts, para. 4, as contained in report of the International Law Commission at its fifty-third session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10) (explaining that even a State acting under its inherent right to self-defence "is 'totally restrained' by an international obligation if that obligation is expressed or intended to apply as a definitive constraint even to States in armed conflict"); IDI resolution, supra note 19, at 3 ("The outbreak of an armed conflict renders operative, in accordance with their own provisions, between the parties treaties which expressly provide that they are to be operative during an armed conflict or which by reason of their nature or purpose are to be regarded as operative during an armed conflict"); Oppenheim, supra note 29, at 304; Briggs, supra note 28, at 942; Starke, supra note 28, at 409.

of war.[102] A recent example of such an express provision is article 6(1) of the 1986 Treaty between the United Kingdom of Great Britain and Northern Ireland and France, which states: "In the event of any exceptional circumstances, such as ... armed conflict or the threat thereof, each Government, after consultation with the other if circumstances permit, may take measures derogating from its obligations under the Treaty, its supplementary Protocols and arrangements, or the Concession."[103] Such cases of express provision are easy, because the intent of the parties that the treaty continue in force during armed conflict is clear.

3. Treaties creating or regulating a permanent regime or status

27. There is broad consensus that treaties declaring, creating, or regulating a permanent regime or status will be unaffected by the outbreak of armed conflict between some or all of its members.[104] This includes treaties providing sovereignty, ceding territory, creating servitudes, administering a territory,[105] establishing a boundary[106] and creating an international organization.[107]

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[102] McNair, supra note 36, at 696-97. Sir William Moleswork, speaking for the British Government in the House of Commons on 1 August 1854, said, "[I]n consequence of our being at war with Russia, I hold that we are more bound in honour to pay this debt than if we were at peace." Ibid. At 697, Attorney General Alexander Cockburn said in the House of Commons that if Britain ceased its payments, it "would stand before Europe in the position of a country which took advantage of war to violate engagements to which they were bound by the most solemn consideration of honour and good faith to adhere." Ibid.

[103] Treaty between the United Kingdom and France Regarding the Channel Tunnel, art. 6(1), signed 12 February 1986, 1497 *United Nations Treaty Series* 335, cited in *R. v. Secretary of State for the Environment, Transport and the Regions* (2001) EWCA Civ. 1185, Case No: QBACF/2000/3675/A3 (Court of Appeal, Civil Div., 23 July 2001).

[104] McNair, supra note 36, at 704, 720; Delbrück, supra note 6, at 1370; Aust, supra note 28, at 244; Verzijl, supra note 6, at 371-72; Oppenheim, supra note 29, at 304; Tucker, supra note 28, at 501; McIntyre, supra note 7, at 53 ("[T]he practice of the United States indicates that treaties which are intended to create perpetual arrangements ... (the exercise of which would not be inconsistent with national policy during the war) are generally regarded as surviving the outbreak of war between the parties"); Stone, supra note 2, at 448; United Nations study on minorities, supra note 76, at 9. But see ibid. at 449 (arguing that "multilateral instruments of international legislation ... are at least suspended during the war between opposed belligerents ... [and that] State practice has ... tend[ed] ... to treat all inter-belligerent treaty relations, including those of a general and legislative character, as abrogated by war"); Starke, supra note 28, at 409.

[105] McIntyre, supra note 7, at 71 ("Since the inception of the trusteeship system, the United Nations has acted on the assumption that the Congo Basin treaty continued in force for all of the parties to it despite the war ... even though a political treaty. The multilateral character of the agreement undoubtedly contributed to the maintenance of this convention").

[106] Tobin, supra note 23, at 50 ("There appears to be unanimous opinion that war has no effect on boundary provisions either during or subsequent to hostilities"); McNair, supra note 36, at 705; *Restatement 3d*, supra note 79, at § 336 reporter's note 2; Stone, supra note 2, at 448; Oppenheim, supra note 29, at 304. See also Kaiyan Homi Kaikobad, *The Shatt-al-Arab Boundary Question: A Legal Reappraisal*, 56 *British Yearbook of International Law* 49, 67-69, 80-85, 95 (1985). But see 6 *Annuaire français de droit internationale* 140 (1960) (describing and criticizing Great Britain's unilateral annexation of Cyprus in 1914 based on the proposition that the war between Great Britain and Turkey had rendered the treaty concerning Cyprus invalid).

[107] IDI resolution, supra note 19, at art. 6 ("A treaty establishing an international organization is not affected by the existence of an armed conflict between any of its parties"); Briggs, supra note 28, at 945. Practice and doctrine in this area have changed considerably. The traditional belief was that armed conflict had a more substantial effect on such treaties. Tobin, supra note 23, at 74-82.

28. For example, in *In re Meyer's Estate*, an appellate court in the United States of America addressed the permanence of treaties dealing with territory — the so-called "transitory" or "dispositive" treaties — holding that "[t]he authorities appear to be in accord that there is nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of war in the enforcement of dispositive treaties or dispositive parts of treaties. Such provisions are compatible with, and are not abrogated by, a state of war."[108]

29. Similarly, "there is no doubt that in the British view State rights of a permanent character, connected with sovereignty and status and territory, ... are not affected by the outbreak of war."[109] Reporting in 1900 on the effects of war on the treaties establishing the Orange Free State and the South African Republic, law officers Webster and Finlay stated that "in our opinion, the action of the Orange Free State in taking part in the present war has not, ipso facto, had the effect of putting an end to the instrument constituting its independence. The arrangement made by that instrument set up a state of things intended to be permanent by an act done once for all. Instruments of this kind are not, ipso facto, abrogated by war."[110]

30. Finally, the Vienna Convention on Succession of States in respect of Treaties reaches a similar conclusion about the resilience of boundary treaties, stating that "[a] succession of States does not as such affect a boundary established by a treaty, or obligations and rights established by a treaty and relating to the regime of a boundary."[111] Although not directly relevant to the question of the effect of armed conflict on treaties, many cases of succession of States have come about through armed conflict.

4. Treaties or treaty provisions codifying *jus cogens* rules

31. A *jus cogens* norm is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[112] Thus, by definition, norms belonging to the category of *jus cogens* apply in all situations and are unaffected by the outbreak of armed conflict.[113]

[108] 107 Cal. App. 2d 799, 805 (1981).

[109] McNair, supra note 36, at 705.

[110] McNair, supra note 36, at 706-10.

[111] Vienna Convention on Succession of States in Respect of Treaties, 1946 *United Nations Treaty Series* 3, 17 ILM 1488, art. 11 (opened for signature 23 August 1978).

[112] Vienna Convention on the Law of Treaties, supra note 3, at art. 53.

[113] Chinkin, supra note 15, at 184 ("Even at times of severe crisis seriously threatening group values, humanitarian limits must restrict the options available to national elites. This policy underlies the principle of *jus cogens*"). Some commentators have made the same argument with respect to obligations *erga omnes*, or confused *jus cogens* norms with obligations *erga omnes*. See Tarasofky, supra note 70, at 19-20; Stephanie Simonds, *Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform*, 29 *Stanford Journal of International Law* 165, 190 (1992). Contrary to the above, an obligation is not necessarily *jus cogens* merely by virtue of being *erga omnes*.

5. Human rights treaties

32. Although the debate continues as to whether human rights treaties apply *to* armed conflict,[114] it is well established that non-derogable[115] provisions of human rights treaties apply *during* armed conflict. First, the International Court of Justice stated in its advisory opinion on nuclear weapons that "the protection of the

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[114] See, e.g., Wolf Heintschel von Heinegg, *Introductory Remarks to Fusion or Co-existence of International Human Rights Law and International Humanitarian Law, Symposium held in Kiel (Germany) 19-22 September 2002*, 45 *German Yearbook of International Law* 55, 56 (2002) ("With the strict distinction between the law of war and the law of peace gradually vanishing — this is one understanding — the class law of armed conflict seems to be supplemented or even modified by human rights law. While human rights are, in principle, designed to protect individuals against their governments in times of peace, their relevance also in times of armed conflict has gradually increased In the last two decades"). See also Hans-Joachim Heintze, *The European Court of Human Rights and the Implementation of Human Rights Standards During Armed Conflicts*, 45 *German Yearbook of International Law* 60 (2002); Robert Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1938 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 324 *International Review of the Red Cross* 409 (1998); R. Quentin-Baxter, *Human Rights and Humanitarian Law — Confluence or Conflict?* 9 *Australian Yearbook of International Law* 94 (1985); "Respect for human rights in armed conflicts", resolution 2444 (XXIII) of the General Assembly (19 December 1968); G. I. A. D. Draper, *The Relationship Between the Human Rights Regime and the Law of Armed Conflict*, in *Proceedings of the International Conference on Humanitarian Law — San Remo*, 24-27 September 1970, p. 141 (1970); Alessandro Migliazza, *L'évolution de la règlementation de la guerre à la lumière de la sauvegarde des droits de l'homme*, 137 *Recueil des cours* 142 (1972); A/8052, paras. 20, 28 (1970); Henri Meyrowitz, *Le droit de la guerre et les droits de l'homme*, 88 *Revue de droit public et de la science politique en France et a l'etranger* 1059 (1972); Arthur Henri Robertson, *Humanitarian Law and Human Rights*, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* 793 (Christophe Swinarski ed., 1984); *Reflections on Law and Armed Conflicts* 121-150 (Michael A. Meyer and Hilaire McCoubrey, eds., 1998); René Provost, *International Human Rights and Humanitarian Law* (2002).

[115] For examples of derogation clauses, see International Covenant on Civil and Political Rights, art. 4, adopted 19 December 1966, 999 *United Nations Treaty Series* 171; American Convention on Human Rights, art. 27, opened for signature 22 November 1969, 1144 *United Nations Treaty Series* 143, OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, Organization of American States Treaty Series, No. 36 (1970), reprinted in 1969 *Yearbook on Human Rights* 390 and 65 *American Journal of International Law* 679 (1971); European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, art. 15, 213 *United Nations Treaty Series* 222. See also Yoram Dinstein, *The Reform of the Protection of Human Rights During Armed Conflicts and Periods of Emergency and Crisis*, in *The Reform of International Institutions for the Protection of Human Rights, First International Colloqium on Human Rights* 337 (1993); M. Cherif Bassiouni, *States of Emergency and States of Exception: Human Rights Abuses and Impunity under Color of Law*, in *Non-Derogable Rights and States of Emergency* 125 (Daniel Premont ed., 1996); Stephen P. Marks, *Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts*, in 1 *The International Dimensions of Human Rights* 175 (1982); Judge R. St. J. Macdonald, *Derogations under Article 15 of the European Convention on Human Rights*, 36 *Columbia Journal of Transnational Law* 225 (1997). Professor Heintze argues that the absence of such provisions in contemporary human rights treaties "marks the expansion of human rights, which clearly have to be seen as non-derogable. Even during public emergencies — including war — they cannot be disregarded." Heintze, supra note 114, at 62. He notes that "[t]he UN Secretary General made specific reference to this development by comparing the ICCPR, which contains those rights to be assured even in emergencies in Article 4, and the more recent UN Human Rights treaties, which contain absolutely no restrictions for rights in times of public emergency." Ibid. E/CN.4/1999/92, para. 20).

International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[116] The nuclear weapons opinion is the closest that the Court has come to examining the effects of armed conflict on treaties, including significant discussion of the effect of armed conflict on both human rights and environmental treaties.[117] Second, the International Law Commission stated in its Commentary on the articles on the responsibility of states for internationally wrongful acts that although the inherent right to self-defence may justify non-performance of certain treaties, "[a]s to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct."[118] Finally, commentators are also in agreement that non-derogable human rights provisions are applicable during armed conflict.[119] Because non-derogable human rights provisions codify *jus cogens* norms,[120] the application of non-derogable human rights provisions during armed conflict can be considered a corollary of the rule expressed in section 4 above that treaty provisions representing *jus cogens* norms, must be honoured notwithstanding the outbreak of armed conflict.

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[116] *Legality of the Threat or Use of Nuclear Weapons*, supra note 84, at para. 25. Several countries had advanced similar arguments in their written submissions to the Court. The United States argued that the "use of nuclear weapons in the exercise of legitimate self-defense would not be in any way inconsistent with" the international human right to life, tacitly accepting its applicability in armed conflict. *Legality of the Threat or Use of Nuclear Weapons*, written submission of the United States, p. 43 (20 June 1995). In the same way, the Russian Federation tacitly accepts the applicability of the Genocide Convention of 1948 and of human rights law to situations of armed conflict. *Legality of the Threat or Use of Nuclear Weapons*, written submission of the Russian Federation, p. 9 (19 June 1995). France similarly tacitly accepted the applicability of human rights law to situations of armed conflict. *Legality of the Threat or Use of Nuclear Weapons*, written submission of France, p. 38 (20 June 1995). The above written pleadings are available online at http://www.icj-cij.org/icjwww/icases/iunan/iunan_ipleadings/iunan_ipleadings_writtenpleadingstoc.htm.

[117] One of the arguments in the case — that the threat or use of nuclear weapons is illegal under international law because it would violate provisions of environmental or human rights treaties — is premised on the assumption that these treaties continue to apply in armed conflict. For an additional discussion of the opinion, see Edda Kristjansdottir, *Note. The Legality of the Threat or Use of Nuclear Weapons Under Current International Law: The Arguments Behind the World Court's Opinion*, 30 *New York University Journal of International Law and Policy* 291 (1997-98).

[118] See report of the International Law Commission at its fifty-third session, supra note 101, at p. 178, para. 3.

[119] M. Cherif Bassiouni, *Accountability for International Crimes and Serious Violations of International Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 *Journal of Law and Contemporary Problems* 63, 65 (1996) (arguing that *jus cogens* norms "are non-derogable in times of war as well as peace") (citing Bassiouni, *Non-Derogable Rights and States of Emergency*, supra note 115, at 125); see, e.g., Silja Vöneky, *A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage*, 9(1) *Review of European Community and International Environmental Law* 20, 23 n. 34 (2000); (arguing that human rights treaties are "commonly regarded as applicable during war") (citing, inter alia, W. Kälin and L. Gabriel, *Human Rights in Times of Occupation: An Introduction* in *Human Rights in Times of Occupation: The Case of Kuwait* 1, 26, 79 (W. Kälin and L. Gabriel eds. (1994)).

[120] The Vienna Convention defines *jus cogens* norms by their non-derogable character. Vienna Convention on the Law of Treaties, supra note 3, at art. 53.

33. Although the effect of armed conflict on derogable human rights provisions is not as clear as with the non-derogable provisions, there is growing acceptance of the proposition that these provisions may also apply during armed conflict. First, as early as 1950, before the existence of the modern human rights conventions, the United Nations Commission on Human Rights concluded in a study on treaties concerning minorities — precursors to human rights treaties — that they were not terminated by war.[121] It reached its conclusion by arguing that such treaties fit into the two classes of treaties then believed to withstand the outbreak of war, namely treaties "to which belligerents and neutral countries are parties ... [and treaties creating] ... permanent situations of general interest."[122] Second, 1 of the 11 substantive articles of the resolution of the Institut de droit international is devoted to the subject, stating "The existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides."[123] Finally, the International Court of Justice stated in its advisory opinion on nuclear weapons that with regard to derogable provisions the test "falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."[124] The Court thus left open the possibility that derogable human rights provisions could apply during armed conflict to the extent that IHL so provides.

34. In conclusion, it is well established that non-derogable human rights provisions apply during armed conflict, and there is a growing consensus that derogable provisions may apply as well. With these results in mind, a caveat is in order: a clear distinction must be drawn between the effect armed conflict has on human rights treaties — that is, the continued legal vitality of the treaty provision itself — and the effect armed conflict has on State behaviour as measured by these treaties. While armed conflict often results in increased breaches of human rights treaties, this is distinct from the legal status of the treaty provisions themselves. As discussed previously with respect to humanitarian treaties,[125] an examination of the effect of armed conflict on human rights treaties makes clear the need to distinguish between the legal effect armed conflict has on the vitality of these treaties, which appears to be minimal, and violations of these treaties during armed conflict, which, unfortunately, may be quite significant.

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[121] United Nations study on minorities, supra note 76, at 9.

[122] Ibid. at 8-9.

[123] IDI resolution, supra note 19, at Art. 4.

[124] *Legality of the Threat or Use of Nuclear Weapons*, supra note 84, at para. 25. Commentators have also emphasized the importance of the *lex specialis* doctrine when discussing the effect of armed conflict on environmental treaties. See, e.g., Vöneky, supra note 119, at 25; Simonds, supra note 113, at 188. At least one commentator has noted weaknesses with the *lex specialis* doctrine. First, "the traditional dichotomy between the international law of war on the one hand and the law of peace on the other hand is dissolving." Vöneky, supra, at 25. Second, "there is no evidence that states commonly hold that the protection of the environment during war shall be determined only by the laws of war ... [A]s some states argue against the application of peacetime environmental law and some states argue in favour of it, there is no common opinion iuris that the applicability of peacetime environmental treaties during armed conflict is excluded." Ibid.

[125] See supra notes 96-100 and accompanying text.

6. Treaties governing intergovernmental debt

35. There is strong support for the proposition that treaties regulating intergovernmental debt continue to apply during armed conflict. According to McIntyre, it is "a well established principle ... that an intergovernmental debt based on treaty is not impaired by war between the parties."[126] For example, the United States of America never regarded such treaties "as even suspended as a result of World War II, although actual payment may have been rendered impossible during the period of hostilities."[127] Similarly, during the Spanish-American War of 1898, "[w]hile Spain did not make any payments on her debt to the United States while the war was in progress, she did resume payments, including the one for the year of actual hostilities, shortly after the return of peace."[128] Finally, Great Britain continued loan payments to Russia during the Crimean War, thus honouring a treaty expressly providing for continued payments during war.[129] McIntyre concludes that "[t]his is perhaps the most outstanding example of what is now a well established principle, namely that an intergovernmental debt based on treaty is not impaired by war between the parties."[130]

7. Diplomatic conventions

36. It is well established that armed conflict should have no effect on diplomatic conventions. In the *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*U.S. v. Iran*),[131] the International Court of Justice issued a very clear opinion on the effect of conflict on treaties concerning diplomatic immunity, "resoundingly affirm[ing] the global importance of the protection of diplomats and of diplomatic communications for the maintenance of a minimum public order."[132] In the words of Christine Chinkin, "[i]t appears from this unanimous decision that no degree of crisis between the States and no threat to internal group values would support derogation from the performance of [diplomatic conventions]."[133] Although the Court issued its decision in the context of undeclared hostilities, it extended its ruling to all forms of armed conflict, stating in the clearest possible terms that "[e]ven in the case of armed conflict or in the case of a breach in diplomatic relations, [the Vienna Conventions on Diplomatic and Consular Relations] require that both the inviolability of the members of a diplomatic mission and of the premises ... must be respected by the receiving State."[134]

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[126] McIntyre, supra note 7, at 215.

[127] Ibid. at 214.

[128] Ibid. at 215.

[129] Ibid. at 215.

[130] Ibid.

[131] *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States v. Iran*), *Judgment, ICJ Reports 1980*, p. 4.

[132] Chinkin, supra note 15, at 195. The Court also ruled that other treaties, such as the Treaty of Amity, Economic Relations, and Consular Rights of 1957, were unaffected by the hostilities. See Pieter H. F. Bekker, *International Decision: Oil Platforms* (*Iran v. United States*), *International Court of Justice, 6 November 2003*, 98 *American Journal of International Law* 550, n. 2 (David D. Caron, ed., 2004). For an additional discussion of this treaty, see infra note 249 and accompanying text.

[133] Chinkin, supra note 15, at 195.

[134] *ICJ Reports 1980*, at p. 40, para. 86 (cited in Chinkin, supra note 15, at 195 n. 70). See also Richard Falk, *The Iran Hostage Crisis: Easy Answers and Hard Questions*, 74 *American Journal of International Law* 411 (1980) (noting that "[e]ven Hitler, it is alleged, never violated the

B. Treaties exhibiting a moderately high likelihood of applicability

1. Reciprocal inheritance treaties

37. The present section outlines State practice with regard to reciprocal inheritance treaties, finding that although a strong line of cases in the United States of America supports their continued applicability during armed conflict, a significant body of jurisprudence in France holds them to be absolutely abrogated.

38. As part of the American practice that treaties "which involve private rights (the exercise of which would not be inconsistent with national policy during the war) are generally regarded as surviving the outbreak of war between the parties",[135] a large body of jurisprudence exists in the United States of America supporting the proposition that "the treaty right of acquiring real estates [sic] in the United States from a deceased American, either dying intestate or in virtue of his will, is not denied to heirs who have become enemy aliens as a consequence of the outbreak of war."[136] In *Society for the Propagation of the Gospel v. New Haven* in 1823, the United States Supreme Court said in dicta that "treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts."[137]

39. In 1920, in the case of *Techt v. Hughes*, Judge Cardozo of the Court of Appeals of New York held that reciprocal inheritance provisions in the 1848 treaty between the United States and Austria-Hungary survived the outbreak of war between the two countries.[138] In what has become the most celebrated passage in all of the commentary on the effect of armed conflict on treaties, Judge Cardozo wrote:

> "International law to-day does not preserve treaties or annul them regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules. When it attempts to do more, it finds that there is neither unanimity of opinion nor uniformity of practice ... When I ask what that principle or standard is, and endeavour to extract it from the long chapters in the books, I get this, and nothing more, that provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected."[139]

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diplomatic immunity of his enemies. In fact, one has to search the books of diplomatic history to find [evidence of non-performance of diplomatic conventions], and in each instance the challenge to diplomatic decorum came from a source that can be credibly dismissed as 'barbarian.'"); letter of acting Legal Adviser (Tate) to the Attorney General (Clark), 10 November 1948, MS. Department of State, file 711.622/9-1648 (stating United States Government position that treaties regulating property used for consular purposes continue in effect during armed conflict).

[135] McIntyre, supra note 7, at 53.

[136] Verzijl, supra note 6, at 382. For a detailed description of the effect of armed conflict on reciprocal inheritance treaties, see Lenoir, supra note 42 (pre-Second World War decisions); Rank, supra note 34, at 511-21 (post-Second World War decisions). See also McNair, supra note 36, at 711-14.

[137] 8 Wheat 464, 494-95 (U.S. 1823).

[138] 229 NY 222, 128 NE 185 (1920), cert. denied 254 US 643 (1920).

[139] Ibid. at 241-43.

40. Judge Cardozo concluded by finding nothing incompatible with the policy of the Government, with the safety of the nation or with the maintenance of the war in the enforcement of a mutual inheritance treaty, and held that the treaty was not abrogated.[140]

41. In 1926, the Kansas Supreme Court, in *State ex rel. Minor v. Reardon*, also held that the reciprocity inheritance clause of the treaty of 1828 between the United States of America and Prussia survived the outbreak of war, stating "we regard the reciprocal privilege of inheritance as not so related to the carrying on of a war as to create a presumption of an intention it should operate only in time of peace."[141] This conclusion was quite extraordinary in the light of the language of article 289 of the Treaty of Versailles, concluding the First World War, stating that the United States of America must notify Germany of all treaties which it wishes to revive, and that all other treaties "are and shall remain abrogated."[142] The Court reasoned that the ability of the United States of America to revive treaties under article 289 was a privilege, not a requirement, and that "it is difficult to believe there was a purpose to withdraw the privilege of individuals to inherit, which is not incompatible with hostilities, and which the war itself had not disturbed."[143]

42. In 1947, the United States Supreme Court held, in *Clark v. Allen*, that the Second World War did not abrogate the Treaty of 8 December 1923 granting certain reciprocal inheritance rights to American and German nationals regarding property situated in the other country.[144] The Court used the test of "compatibility with national policy" and held that provisions guaranteeing reciprocal inheritance rights would not be incompatible and that the treaty should be honoured.[145] In 1951, a California Appeals Court held in *In re Meyer's Estate* that the First World War did not abrogate reciprocal inheritance provisions in the Convention of 1827 between

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[140] Ibid. at 244. In addition to being a holding and not mere dicta, the *Techt* decision is broader than *Society for the Propagation of the Gospel*. Because the proprietary rights accrued before the war in *Society for the Propagation of the Gospel*, the dicta in that case can really be relevant only as to the vested rights created by treaty. In the *Techt* case, however, the rights were acquired after the war in question, and thus the holding is relevant to the effect of armed conflict on the treaty itself, not merely the rights it creates. See infra note 149. See also *Goos v. Brocks*, 117 Neb. 750, 223 NW 13 (1929) (Nebraska Supreme Court following *Techt* and holding that reciprocal inheritance provisions in a treaty between the United States and Prussia survived the outbreak of war). For a discussion of both *Techt* and *Goos*, see Lenoir, supra note 42, at 163-64 (noting that "[t]he chief distinction between the two cases is that in *Goos v. Brocks* the decision was rendered several years after the Treaty of Peace with Germany, while the *Techt* case was decided before the Treaty of Peace, and thus technically, before the war was at an end").

[141] 120 Kan. 614, 616-17, 245 Pac. 158, 159 (1926).

[142] Treaty of Versailles, art. 289 (28 June 1919), reprinted in 13 *American Journal of International Law* 151 (Supp. 1919).

[143] *Reardon*, supra note 141, at 619. At about this same time, a United States District Court held in 1928 in *Hempel v. Weedin* that certain stipulations in the Treaty of 1828 with Prussia providing for reciprocal security of private citizens survived war between the United States and Germany. 23 F.2d 949 (WD Wash. 1928). See also *The Sophie Rickmers Case*, 45 F.2d 413 (SDNY 1930) (holding that treaties with Germany relating to reciprocal tonnage duties were not annulled by the outbreak of the First World War).

[144] *Clark v. Allen*, 331 US 503 (1947). Similarly, in 1948 the Supreme Court of California held in *In re Knutzen's Estate* that the Treaty of 1923 between the United States and Germany allowing reciprocal inheritance was in force and not abrogated or suspended by the outbreak of the Second World War 31 Cal. 2d 573, 191 F.2d 747 (1948). See also *Blank v. Clark*, 79 F. Supp. 11 (1954) (ED Pa. 1948) (different court reaching same result as to same treaty).

[145] Rank, supra note 34, at 512.

the United States of America and the Free Hanseatic Republics, like the *Reardon* Court, this Court argued that the clear language in article 289 of the Treaty of Versailles, stating that all treaties not subject to notification by the United States of America are abrogated, did not apply. Instead, it held that the language "all the others are and shall remain abrogated" in article 289 did not intend to "absolutely wipe out all former treaties between the United States and the German states."[146] The Court called the provision "equivocal and uncertain" and concluded that "[i]n the absence of express words to that effect, it is difficult to infer that it was the purpose of the contracting parties to withdraw the privilege of individuals to inherit, which was not incompatible with hostilities, and which the war had not disturbed."[147]

43. The Courts of other countries have reached similar conclusions. In the well-known English decision in *Sutton v. Sutton*, Sir John Leach, the Master of the Rolls, held that the outbreak of the War of 1812 between Great Britain and the United States of America had no effect upon article 9 of the Jay Treaty of 19 November 1794 between the two countries, allowing for reciprocal rights to hold, sell, pass on and acquire title to land.[148] The Master of Rolls said, "It is a reasonable construction that it was the intention of the Treaty that the operation of the Treaty should be permanent, and not depend upon the continuation of a state of peace."[149]

44. The situation in Germany appears unsettled. On the one hand, the German Reichsgericht held twice that commercial treaties between Germany and Russia providing for reciprocity of treatment regarding the acquisition of real property were abrogated by the First World War.[150] On the other hand, German courts have held that "if a treaty has been abrogated by war, its provisions still remain in force in the body of the domestic law."[151]

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[146] *In re Meyer's Estate*, supra note 71, at 808-09.

[147] Ibid. at 809. The United States position was also stated by Acting Secretary of State Grew in 1945 in response to an inquiry by Attorney General Biddle as to the effect of the Second World War on the reciprocal inheritance provisions of the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany (52 LNTS 133). After outlining much of the case law discussed above, the Acting Secretary of State concludes: "In the light of the foregoing the Department perceives no objection to the position which you are advancing to the effect that Article IV of the Treaty of December 8, 1923, with Germany remains in effect despite the outbreak of war." Whiteman, supra note 32, at 495-97 (citing letter of the Acting Secretary of State (Grew) to the Attorney General (Biddle), 21 May 1945, MS. Department of State, file 740.00113 EW/4-1245).

[148] *Sutton v. Sutton*, 39 Eng.Rep. 255 (1830) (discussed in McNair, supra note 36, at 711-13).

[149] Cited in McNair, supra note 36, at 712. McNair emphasizes that because *Sutton* concerned propriety rights accruing before the war, it cannot stand for the proposition that propriety rights accruing after a war would also be protected, as does the United States decision in *Techt v. Hughes*, supra. In this way, the United States decision in *Techt* goes beyond both the United States decision in *Society for the Propagation of the Gospel* and the English decision in *Sutton*, because both of the latter cases concern only the effect of armed conflict on vested rights, not the treaties that created those vested rights.

[150] Decision of 20 October 1922 (AD 1919-1922, Case No. 169) and decision of 23 May 1923 (AD 1925-1926, Case No. 331) (cited in Verzijl, supra note 6, at 382-83). See also Rank (Part II), supra note 34, at 531-32 (describing a split in the German decisions but noting that "[t]he general view of German courts seem to be that bilateral treaties, even those concerning private rights, are abrogated by war" (citing 4 *Neue Juristische Wochenschrift 831* (1951)).

[151] J. G. Castel, note, *International Law — Effect of War on Bilateral Treaties — Comparative Study*, 51 *Michigan Law Review* 566, 569 n. 19 (1952-53) (citing 85 *Entscheidungen des Reichsgerichts in Zivilsachen* 374 (neue Folge) (1915)).

45. Although the jurisprudence of the French courts has varied with time,[152] it has now settled on the abrogation doctrine. Before and during the First World War, French courts "generally followed the abrogation doctrine, holding that all treaties, including those of a purely private law character, were abrogated by war. In a few cases they made exceptions and held that treaties of a private law character were not abrogated, but only suspended."[153] After the Second World War, the courts wavered somewhat on the general abrogation rule. Although multilateral treaties guaranteeing private rights were generally honoured,[154] the decisions on private law treaties are inconsistent. After an initial period in which French lower courts held that bilateral treaties guaranteeing private rights were abrogated by war,[155] French courts adopted a more liberal view for five years, most notably in the decision of the Court of Cassation (Social Chamber) in *Bussi v. Menetti*, holding that the Treaty of Establishment of 3 June 1930 between France and Italy was not abrogated by the First World War because "treaties of a purely private law nature, which do not involve any intercourse between the enemy Powers and which have no connection with the conduct of hostilities, ... are not, by the mere fact of war, suspended in their effects."[156] Five years after the Social Chamber's change of course in the *Bussi* decision, the Civil Chamber of the Court of Cassation opted for the absolute abrogation doctrine in *Artel v. Seymond*,[157] stating that "the existence of a state of war renders null and void all reciprocal obligations assumed by the High Contracting Parties in a treaty concluded on matters of private law affecting

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[152] See, e.g., French court's early decision in *Isnard Blark v. Pezzales*, S. 1859.2.606 (Aix, 8 December 1858) (supporting "modern" view) (cited in Castel, supra note 151, at 568 n. 13).

[153] Rank (Part II), supra note 34, at 521.

[154] *French National Railway Company v. Chavannes*, Court of Appeal of Aix (9 February 1943), reported in 2 *Semaine juridique* 2417 (1943); *Compagnie des Assurances Maritime, Aérienne et Terrestre v. Scagni*, 36 *Revue critique de droit international privé* 294 (1947); *Annual Digest* Case No. 99 (1946). For a further discussion of such cases, see Rank (Part II), supra note 34, at 521-23.

[155] Rank, supra note 34, at 523 (citing, e.g., *S. v. P.*, Tribunal de paix de Marseilles, 5th Canton (2 October 1943), reported in *Gazette du Palais, Provisional Supplement* 170 (1943) (holding that the First World War abrogated the Convention on Establishment between France and Italy, signed in Rome on 3 June 1930, according Italian citizens resident in France national treatment concerning private rights without any requirement of reciprocity); *C. v. B.*, Tribunal civil de Toulouse (18 November 1943), reported in *Gazette du Palais* (14 December 1943) (reaching same result with respect to same treaty).

[156] *Bussi v. Menetti*, Court of Cassation, AD 1943-1945, Case No. 193 (5 November 1943) (discussed in Rank, supra note 34, at 525). See also *I. v. I.*, Tribunal civil de Marseilles (26 October 1943) reported in *Gazette du Palais, Provincial Supplement* 169, November 1943 ("noting that although the outbreak of hostilities often terminates treaties, "those treaties remain in force which relate to the enjoyment of private rights existing before the outbreak of hostilities. In particular treaties dealing with contracts relating to debts or pecuniary obligations, the transfer of movable or immovable property, mortgages, leases, and tenancy agreements, especially if they were entered into force before the declaration of war, remain in full force"); *Marie v. Capello*, Tribunal civil de Caen (9 April 1941), reported in *Gazette du Palais* (29 May 1941); *Poet v. Deleuil*, Court of Cassation, Social Chamber (21 April 1944), reported in *Gazette du Palais* (9 June 1944); *In re Rosso v. Marro*, Tribunal civil de Grasse, AD 1943-1945, Case No. 104 (18 January 1945). Professor Rank lists the following other decisions of the Court of Cassation (Social Chamber) to the same effect: *Hutard v. Margerit* (25 July 1946); *Juidi v. Fassin* (21 March 1947); *Pinna v. Crépillon* (20 May 1947); and *Amadio v. Diduant* (13 February 1948). See Rank, supra note 34, at 525-26.

[157] *Artel v. Seymand*, Court of Cassation, AD 1948, Case No. 133 (10 February 1948) (discussed in Rank, supra note 34, at 527).

relationships in times of peace."[158] The same treaty, the Convention of Establishment between France and Italy, was at issue, yet the Court provides no reasons for this dramatic reversal of doctrine.[159] The Civil Chamber of the Court of Cassation, sitting in plenary assembly, upheld this conclusion, and settled the split between the Civil Chamber and the Social Chamber, with its definitive decision in *Lovera v. Rinaldi*, on 22 June 1949.[160] The Court "finally settled the conflicting views of the French Supreme Court departments and established the old rule of absolute abrogation as the sole legal doctrine of France."[161]

46. In conclusion, there is a very significant line of cases in the United States of America, supported by case law in Great Britain, that reciprocal inheritance treaties continue to apply during armed conflict. This jurisprudence is consistent with the general thesis among many courts and commentators that treaties consistent with national policy during armed conflict should be upheld, since the treaties in question concern only private rights.[162] But, the French Court of Cassation has come to the opposite conclusion, leaving this an unsettled area of international law. Although the French decisions could be distinguished on the grounds that the treaty concerned is not reciprocal, this is unsatisfying; the most important characteristic of the treaties concerned in this subsection would not appear to be their reciprocity but rather the fact they deal with private rights not incompatible with the maintenance of armed conflict. With respect to such treaties, the French abrogation doctrine is at odds with an otherwise strong trend favouring their continued vitality during armed conflict.[163]

2. Multilateral "law-making" conventions

47. Some commentators on the effect of armed conflict on treaties make a distinction between treaties that attempt to create a general policy affecting a broad spectrum of international relations and those with a much narrower focus on resolving a specific problem, usually between a much smaller group of States. The former category includes mostly multilateral treaties.

48. In his analysis of the effect of armed conflict on treaties, McNair uses the term "law-making" treaties to mean "treaties which create rules of international law for regulating the future conduct of the parties without creating an international regime,

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[158] Cited in Rank, supra note 34, at 527-28.

[159] Rank, supra note 34, at 528.

[160] Reported in 77 *Journal de droit international* 125 (1950). See additional cases cited in 4 *Annuaire français de droit international* 775-76 (1958).

[161] Rank, supra note 34, at 528.

[162] See supra notes 43-49 and accompanying text. For a contrary scholarly view, see Stone, supra note 2, at 450 (arguing that "the only safe course is to assume that ... treaties concerning the reciprocal treatment of the parties' nationals, are abrogated on the outbreak of war").

[163] Treaties governing other private rights such as marriage, guardianship, divorce and nationality are also generally upheld provided they are consistent with the maintenance of armed conflict. For example, the ability of a Muslim religious authority to appoint a guardian under the terms of article 11 of the Greco-Turkish Peace Treaty of 14 November 1913 (G. F. De Martens, NR, 3rd ed. vol. VIII, p. 93 et seq.) was unaffected by the outbreak of war in 1914. Verzijl, supra note 6, at 385 (citing Court of Appeal of Saloniki, Case No. 272, AD 1919-1922). Similarly, a French court held that the article 13 of the Franco-Italian Convention of 28 September 1896 dealing with nationality did not lapse with the outbreak of war in 1940. Ibid. (citing Court of Appeal of Paris, Case No. 156, ILR 1951).

status, or system."[164] McNair argues that such law-making treaties "survive a war, whether all the contracting parties or only some of them are belligerents."[165] Among such treaties, he specifically mentions "conventions creating rules as to nationality, marriage, divorce, [and] reciprocal enforcement of judgments."[166] Similarly, Starke states, "Multilateral Conventions of the 'law making' type relating to health, drugs, protection of industrial property, etc., are not annulled on the outbreak of war but are either suspended, and revived on the termination of hostilities, or receive even in wartime a partial application."[167]

49. Although the term "law-making" is somewhat problematic — since all treaties create international law — State practice seems to confirm the premise that multilateral treaties governing specific areas are often given partial application during armed conflict, sometimes with considerable difficulty. For example, during the Second World War, treaties of public health, narcotics, labour, the control of liquor in Africa, slavery, the trade in white women, the suppression of obscene publications and the safety of life at sea continued in force.[168] Multilateral maritime and air transport agreements, as well as communications conventions, were partially inoperative but received partial application.[169] A Scottish court held in 1976 that "[i]t was an accepted principle of public international law that multipartite law-making treaties survived a war."[170] Similarly, Verzijl argues that treaties regulating labour rights do not lapse during armed conflict.[171] Thus, although not as resilient as treaties creating a permanent regime or status,[172] multilateral law-making treaties creating rules governing a particular substantive area are moderately likely to withstand armed conflict.

50. The issue of law-making treaties was discussed by the International Law Commission in drafting the Vienna Convention on Succession of States in Respect of Treaties. Article 16 establishes a general "clean slate" principle to the effect that a newly independent State is not bound by treaties formerly in force in respect of the territory to which the succession of States relates. In its commentary on draft article 16, the Commission concluded after an extensive review of State practice that no exception to "the clean-slate principle applies ... to general multilateral treaties and multilateral treaties of a law-making character."[173] In the context of the clean-slate

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[164] McNair, supra note 36, at 723.

[165] Ibid.

[166] Ibid.

[167] Starke, supra note 28, at 409.

[168] See infra note 283 and accompanying text.

[169] See infra notes 272-290 and accompanying text.

[170] *Masinimport v. Scottish Mechanical Light Industries Limited*, 74 ILR 559, 560 (Scotland, Court of Session, Outer House, 30 January 1976).

[171] Verzijl, supra note 6, at 391 ("Accessions of States to the Convention on Workmen's Compensation of 10 June 1925 do not lapse as a result of war: such Conventions are not simple bilateral or multilateral agreements on the subject, but affiliation to a regime established by an international organization in the interest of the workers of all countries. They are therefore not ipso facto annulled by the state of war") (citing Court of Appeal of Aix, 7 May 1951, ILR 1951, Case No. 155).

[172] See supra notes 104-110 and accompanying text.

[173] Report of the International Law Commission on the work of its twenty-sixth session (A/9610/Rev.1) (6 May-26 July 1974) (in *Yearbook of the International Law Commission*, 1974, vol. II, part 1, pp. 212-13, paras. 8-14).

doctrine, therefore, the Commission refused to create a special exception for law-making treaties.

51. The issue resurfaced late in the Commission's work when Commission member Mr. Ushakov proposed article 12 bis, entitled "multilateral treaties of universal character."[174] The draft article defined such a treaty as "an international agreement which is by object and purpose of worldwide scale, open to participation by all States, concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[175] It stated that any such treaty "in force in respect of the territory to which the succession of States relates shall remain in force between a newly independent State and the other States parties to the treaty until such time as the newly independent State gives notice of termination of the said treaty for that State."[176] The draft article was tabled because there was not sufficient time to discuss its implications, and instead it was mentioned and reproduced in the introductory part of the report of the International Law Commission to the General Assembly.[177]

C. Treaties exhibiting a varied or emerging likelihood of applicability

52. The present section examines treaties which exhibit either a controversial, varied or emerging likelihood of applicability during armed conflict, including international transport agreements; environmental treaties; extradition treaties; border-crossing treaties; treaties of friendship, commerce and navigation; intellectual property treaties; and penal transfer treaties.

1. International transport agreements

53. The State practice related to international transport agreements is contradictory. Chinkin notes that "[u]nlike diplomatic relations between States, restrictions on any given route do not threaten the entire structure of interstate communications. If acceptable alternative routes exist, the demands of the transit States are more likely to be deemed reasonable."[178] She distinguishes a split in State practice between air agreements pertaining to overflight or landing rights, evincing a moderate or low applicability during armed conflict, and sea agreements pertaining to international oceanic canals, evincing a somewhat higher degree of applicability during armed conflict.[179] Here each will be treated in turn.

a. Air agreements

54. History is replete with examples of armed conflict causing the suspension of international air agreements.[180] First, as a result of the 1967 Middle East war, Syria,

[174] *Yearbook of the International Law Commission*, 1974, vol. I, pp. 243-45, paras. 54-75, p. 246, para. 9.
[175] Ibid. at p. 244, para. 54.
[176] Ibid.
[177] Report of the International Law Commission on the work of its twenty-sixth session, supra note 173, p. 172, para. 75.
[178] Chinkin, supra note 15, at 196.
[179] Ibid. at 196-205.
[180] Bin Cheng, *The Law of International Air Transport*, 113-15, 483-84 (1962).

Iraq, the Sudan and Egypt closed airports and seaports to the United States of America and the United Kingdom of Great Britain and Northern Ireland.[181] Chinkin notes that although these actions cannot generally be justified on the grounds of military necessity, an argument could be made that they are justifiable as collective self-defence in their war against Israel.[182] Second, airports in Senegal, Guinea and Canada were closed to Soviet aircraft bound for Havana in 1962 in response to the United States-led quarantine of Cuba.[183] Third, the Turkish invasion of Cyprus in 1974 and the continuing dispute over the delimitation of the continental shelf in the Aegean Sea caused Greece and Turkey to suspend overflight rights until September 1976, when they were formally reinstated.[184] Fourth, India claimed that two multilateral aviation conventions and a bilateral treaty providing Pakistan overflight and landing rights in India had been suspended in 1971 by the hostilities between India and Pakistan that began in 1965.[185] Pointing to the periodic outbreaks of conflict between the two States since 1947, India argued that Pakistan could not possibly have legitimate expectations of continued air passage rights when further conflict would likely erupt.[186] Pakistan claimed that India, as an aggressor, could not lawfully suspend the agreements.[187] Chinkin argues that

> "States may suspend the agreements when conflict threatens their security. The military hostilities of 1965, although limited both in purpose and arenas, were intense and severe. It would be disruptive and possibly even destructive to a State to insist that it must allow the enemy to fly over and land in its territory ... While Pakistan did suffer considerable economic loss and severe inconvenience, the existence of alternative routes, even though expensive and much less direct, did make India's action more reasonable."[188]

55. Noting two other agreements that continued in effect, including a sea transport agreement,[189] Chinkin concludes that "States might perceive air agreements as potentially more prejudicial to their security interests and thus expect that such agreements will be subject to special consideration."[190] In fact, the Chicago Convention on International Civil Aviation has a provision stipulating that "[i]n case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals."[191]

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[181] Chinkin, supra note 15, at 197.

[182] Ibid. at n. 75.

[183] Ibid. at 198 n. 76.

[184] Ibid. at 198-99 (noting that the actions do not seem justifiable by the doctrine of military necessity).

[185] Ibid. at 200.

[186] Ibid.

[187] Ibid.

[188] Ibid. at 200-01.

[189] The Indus Water Agreement of 1960 (444 *United Nations Treaty Series* 260) and the Agreement to submit the *Rann of Kutch dispute to arbitration* (30 June 1965, 378 *United Nations Treaty Series* 1965).

[190] Ibid. at 202.

[191] Chicago Convention on International Civil Aviation, opened for signature 7 December 1944, art. 89, 15 *United Nations Treaty Series* 296, 61 Stat. 1180, TIAS No. 1591.

b. Sea agreements

56. The effect of armed conflict on agreements establishing inter-oceanic canals such as the Suez, Panama and Kiel Canals, has varied.[192] On the one hand, several examples exist supporting the proposition that conventions allowing access to canals withstand conflict situations. First, when Germany refused to allow passage through the Kiel Canal to a ship carrying munitions to Poland during the Polish-Prussian war of 1920, the Permanent Court of International Justice said in dicta that when a waterway has been "dedicated to international use", the riparian can no longer exclude other States at its discretion.[193] Second, the international community reacted unfavourably to Egypt's closure of the Suez Canal to Israeli shipping beginning in 1948, as closing the Canal was not necessary for Egypt's defence.[194] Third, the Convention regulating traffic on the Rhine "appears to have been considered in force" during the First World War.[195]

57. On the other hand, Britain restricted the passage of enemy ships through the Suez Canal throughout the First and Second World Wars,[196] and the United States of America partially or fully restricted the use of the Panama Canal during the two World Wars.[197] Chinkin argues that sea transport agreements should be honoured during armed conflict because of "the need for reliable and secure communications for international trade and security."[198] In the modern world, however, air transport is also becoming increasingly important to trade and very relevant to security issues in the light of its connection with international terrorism.

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[192] Chinkin, supra note 15, at 202-05 (citing R. Baxter, *The Law of International Waterways* (1964) for a full discussion of the effect of war on transit though waterways).

[193] Chinkin, supra note 15, at 203 (citing The *S. S. Wimbledon* (1923), PCIJ ser. A, No. 1). Chinkin notes, however, that the Court's strong language may have been influenced by the fact that the Treaty of Versailles specifically declared the Canal "free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality." Ibid. (citing Treaty of Peace with Germany (Treaty of Versailles), 28 June 1919, 2 Bevans 43, 225 Parry's TS 188, art. 380). She also believes that Germany would have been afforded greater freedom of action had it been at war, arguing that the riparian's security interest should take priority.

[194] Chinkin, supra note 15, at 204 (citing Baxter, *Passage of Ships through International Waterways in Time of War*, 31 *British Yearbook of International Law* 187 (1955); Khadduri, *The Closure of the Suez Canal to Israeli Shipping*, 33 *Journal of Law and Contemporary Problems* 147 (1968); J. Obieta, *The International Status of the Suez Canal* 13-17 (1970); Gross, *Passage Through the Suez Canal of Israel-Bound Cargo and Israeli Ships*, 51 *American Journal of International Law* 530 (1957); Lapidoth, *The Reopened Suez Canal in International Law*, 4 Syracuse *Journal of International Law and Commerce* 1 (1976)). Dietrich Schindler reports to the Institut de droit international that "[w]ith regard to the Suez Incident of 1956 between Britain, France and Egypt, it has been reported that 'as a result of that incident a law was passed in Egypt (Law No. 1 of 1957) stating that the British aggression had put an end to the [Anglo-Egyptian Agreement of 1954 regarding the Suez Canal Base (210 *United Nations Treaty Series* 3)].'" Apart from this agreement there was probably no effect on treaties. IDI study, supra note 18, at v. 59(1), p. 267 (citing McNair and Watts, *The Legal Effects of War* 20 n. 1 (1966)).

[195] Tobin, supra note 23, at 88. The same is true of the Conventions regulating traffic on the Danube. Ibid. at 92-94.

[196] Chinkin, supra note 15, at 203 n. 96.

[197] Ralph H. Smith, *Beyond the Treaties: Limitations on Neutrality in the Panama Canal*, 4 *Yale Studies in World Public Order* 1, 16-20 (1977-78).

[198] Chinkin, supra note 15, at 205.

2. Environmental treaties

58. Recent scholarly consideration of the applicability of peacetime environmental treaties during armed conflict has spawned the most significant discussion of the effect of armed conflict on treaties since the Second World War.[199] This renewed interest can be attributed both to the considerable environmental destruction caused by the first Gulf war[200] as well as to the growth and development of international environmental law itself.[201] Whatever the cause, the effect of armed conflict on international environmental law has received more modern attention than the effect of armed conflict on any other kind of treaty, and marks the most significant development in the topic since the 1985 study by the Institut de droit international.

59. Reviewing the extensive body of new scholarly commentary on the effect of armed conflict on environmental treaties,[202] it is clear that not all environmental treaties react to armed conflict in the same way, and one commentator has categorized them in four distinguishable groups. First, environmental treaties including express terms providing for their application during armed conflict will continue to apply, such as the small class of treaties protecting specific areas, including the Antarctic, the Spitsbergen archipelago and outer space.[203] Although some commentators support this approach,[204] others argue that to treat environmental treaties as objective regimes[205] not subject to suspension during

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[199] See, e.g., Vöneky, supra note 119; Tarasofsky, supra note 70; Michael Bothe, *The Protection of the Environment in Times of Armed Conflict: Legal Rules, Uncertainty, Deficiencies and Possible Developments*, 34 *German Yearbook of International Law* 54 (1991); Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 *Yale Journal of International Law* 1, 37-41 (1997); Simonds, supra note 113, at 188-198; A. Roberts, *Environmental Issues in International Armed Conflict*, in R. J. Grunawalt et al., *Protection of the Environment during Armed Conflict* 222 (1996); Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold* (2004).

[200] In the two years following the 1991 Gulf war, there were five major conferences on the subject, the Sixth Committee of the General Assembly began deliberations on it, the General Assembly adopted a resolution on it, and it was addressed at the United Nations Conference on Environment and Development, leading to the Rio Declaration on Environment and Development as well as Agenda 21. Tarasofsky, supra note 70, at 19.

[201] For example, Professor Tarasofsky argues that the modern legal understanding of the environment, based on the interdependence of multiple ecosystems, makes it impossible to maintain "different rules of environmental protection for peacetime and wartime." Tarasofsky, supra note 70, at 21.

[202] See works cited supra note 199.

[203] Simonds, supra note 113, at 193 (citing the Antarctic Treaty, 12 December 1959, art. 1, 402 *United Nations Treaty Series* 71, 12 UST 794; Treaty Concerning the Archipelago of Spitsbergen, 9 February 1920, 2 LNTS 8, T. S. No. 686, 13 Martens 473 (1924-25); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, opened for signature 27 January 1967, art. 4, 610 *United Nations Treaty Series* 205, 18 UST 2410. Also in this group, Simonds includes the 1982 United Nations Convention on the Law of the Sea, which reserves the high seas and the deep seabed exclusively for "peaceful purposes", contradicting the traditional principle of freedom of warfare on the high seas. Simonds, supra note 113, at 194 (citing United Nations Convention on the Law of the Sea, 10 December 1982, arts. 88, 141, 1833 *United Nations Treaty Series* 3, 21 ILM 1261 (1982) (UNCLOS).

[204] See, e.g., Simonds, supra note 113, at 190.

[205] See discussion of permanent regimes supra part III. A.

armed conflict would be contrary to the intention of the framers of those treaties.[206] Second, a group of environmental treaties contains express language making them wholly or partly inapplicable in times of armed conflict. For example, a great number of conventions limiting ocean pollution do not apply to Government ships or warships.[207] Third, an intermediate group of treaties, although lacking express language on applicability, will generally apply during armed conflict because their terms will most likely be compatible with national policy during the armed conflict. In this group Simonds places environmental treaties containing general provisions encouraging environmental protection,[208] treaties protecting certain sectors of the environment "not inherently necessary to war",[209] treaties permitting derogation in

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[206] See, e.g., Vöneky, supra note 119, at 23 ("Whether any peacetime environmental treaties create 'objective regimes' ... is questionable. Treaties for the use and protection of areas beyond national jurisdiction — such as the high seas, the deep sea-bed, outer space and Antarctica — are similar to treaties providing for objective regimes, since they regulate state conduct in a certain territory as well. But only some commentators support the view that the Antarctic Treaty and its supplementing Conventions fall into this category. Others deny this with the convincing arguments that it was not the intention of the Parties of the Antarctic Treaty to establish an order with the effect *erga omnes*, and besides this the Antarctic Treaty does not provide a territorial order. It is therefore under strong dispute whether the rule of general international law that treaties providing for objective regimes bind belligerents is directly applicable to environmental treaties") (citing E. Klein, *Statusverträge im Völkerrecht* 295 et seq. (1980) (supporting objective regime theory for environmental treaties); A. Verdross and Bruno Simma, *Universelles Völkerrecht* 745 (1984) (supporting objective regime theory for environmental treaties); Tarasofsky, supra note 70, at 63 (supporting objective regime theory for environmental treaties); R. Wolfrum, *Die Internationalisierung Staatsfreier Räume* 96 n. 253 (1984) (critical of theory); *Klein*, supra at 111 et seq. and 122 et seq. (critical of theory)).

[207] Simonds, supra note 113, at 194-95 (citing International Convention for the Prevention of Pollution of the Sea by Oil, 12 May 1954, 327 *United Nations Treaty Series* 3, 12 UST 2989; International Convention for the Prevention of Pollution by Ships, 11 February 1973, art. 3(3), 1340 *United Nations Treaty Series* 61, 12 ILM 1375; International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, arts. 3(2)(a), 11, 973 *United Nations Treaty Series* 3, reprinted in Alexandre Kiss, *Selected Multilateral Treaties in the Field of the Environment* 235 (1983); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 29 December 1972, art. 7.4, 1046 *United Nations Treaty Series* 120, 26 UST 2403, amended 12 October 1978, TIAS No. 8165, 18 ILM 510 (1979); Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, 24 April 1978, 1140 *United Nations Treaty Series* 133). Although UNCLOS was discussed above in the context of environmental treaties explicitly applying during armed conflict, it also contains one provision specifically exempting warships and other ships or aircraft used by a State in non-commercial service from its provisions dealing with the protection and preservation of the marine environment. Simonds, supra, at 195 (discussing UNCLOS art. 32).

[208] Simonds, supra note 113, at 195 (citing a non-binding resolution, a non-binding declaration and the Convention on the High Seas, arts. 24-25, 450 *United Nations Treaty Series* 82, 13 UST 2312 (29 April 1958)).

[209] Simonds, supra note 113, at 196 (citing Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, supra note 207; Vienna Convention of 1985 for the Protection of the Ozone Layer, 22 March 1985, UNEP document IG 53/5, 1513 *United Nations Treaty Series* 324, 26 ILM 1529 (1987); Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 *United Nations Treaty Series* 29, S. Treaty Doc. No. 10, 100th Congress, 2d session 26 ILM 1541). Silva Vöneky has also examined this classification, arguing that "another important category of peacetime treaties that bind belligerents during an armed conflict limiting their military activities ... [are those] aimed at the protection of a common good in the interest of the state community as a whole." Vöneky, supra note 119, at 27. In addition to human rights treaties, Vöneky cites several environmental treaties in this category, including the Framework Convention on Climate Change, 1771 *United Nations Treaty Series*

times of emergency[210] and treaties setting aside certain areas of the world for special environmental protection.[211] Fourth, treaties which require "advance notification, consultation, or public environmental assessments before engaging in ... military actions are often incompatible with military secrecy",[212] despite the lack of express language to this effect.

60. The effect of armed conflict on environmental treaties was also a significant source of discussion in the course of the International Court of Justice advisory opinion on nuclear weapons, both in the submissions of the parties and in the opinion of the Court. The United States of America argued, on the basis of the language of the treaties, that "[n]o international environmental instrument is expressly applicable in armed conflict."[213] France similarly denied the applicability of environmental treaties.[214] The United Kingdom of Great Britain and Northern Ireland did not comment on the effect of armed conflict on environmental treaties at all, instead arguing that such treaties would be inapplicable under their terms.[215]

165, reprinted in 31 ILM 849 (1992); the Convention on Biological Diversity, 1760 *United Nations Treaty Series* 143, reprinted in 31 ILM 922 (1992); the Vienna Convention for the Protection of the Ozone Layer, supra; the UNESCO Convention for the Protection of the World Cultural and Natural Heritage, 1037 *United Nations Treaty Series* 132, reprinted in 11 ILM 1358 (1972); the Convention on the Conservation of Migratory Species of Wild Animals, 1651 *United Nations Treaty Series* 356, reprinted in 19 ILM 15 (1980); the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 *United Nations Treaty Series* 244, reprinted in 12 ILM 1085 (1973); the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 996 *United Nations Treaty Series* 246, reprinted in 11 ILM 963 (1972); the Convention on the Conservation of European Wildlife and Natural Habitats; 1284 *United Nations Treaty Series* 209; the African Convention on the Conservation of Nature and Natural Resources, 1001 *United Nations Treaty Series* 4. Vöneky, supra, at 28-29. Vöneky also argues that "treaties for the use and protection of shared natural resources will continue to apply only if they are aimed at protecting an environmental good in the common interest of the state community as a whole." Ibid. at 29. Contrary to Simonds, Vöneky argues that treaties aimed at the protection of a common good may continue to apply during armed conflict notwithstanding an incompatibility with the armed conflict. Ibid.

[210] Simonds, supra note 113, at 196 (citing Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, arts. 5-8 (15 February 1972), 952 *United Nations Treaty Series* 4, reprinted in Kiss, supra note 207, at 266). See also Vöneky, supra note 119, at 30-31 (discussing the non-derogable core of obligations protecting the environment).

[211] Simonds, supra note 113, at 196-97 (citing UNESCO Convention for the Protection of the World Cultural and Natural Heritage, supra note 209).

[212] Simonds, supra note 113, at 197-98 (citing Convention on Long-Range Transboundary Air Pollution, art. 3, 1302 *United Nations Treaty Series* 217, TIAS 10541 (13 November 1979), reprinted in Kiss, supra note 207, at 519).

[213] Nuclear weapons advisory opinion, written submission of the United States, pp. 34-42 (20 June 1995).

[214] Nuclear weapons advisory opinion, written submission of France, p. 38 (20 June 1995).

[215] For example, the United Kingdom argued that the 1977 United Nations Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques would not apply since it only protects against the deliberate manipulation of the environment as a method of war, not environmental degradation as a side-effect of warfare itself. Kristjansdottir, supra note 117, at 359-60 (citing nuclear weapons advisory opinion, written submission of the United Kingdom, para. 3.75 (16 June 1995) (referring to the 1977 United Nations Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1108 *United Nations Treaty Series* 151)). Similarly, the United Kingdom argued that environmental treaty provisions were of an overly general nature, and that it is a fundamental principle of the law of treaties that a prohibitive rule, purporting to exclude a particular activity from the scope of permissible State practice, must be clearly stated. As a

61. In a brief submitted to the Court by the Government of Solomon Islands, the question of the effects of armed conflict on treaties was examined thoroughly.[216] After arguing on the basis of the IDI resolution that "the outbreak of an armed conflict 'does not ipso facto terminate or suspend the operation of treaties in force between the parties to the armed conflict,'"[217] the brief argued that this rule was specifically applicable to environmental treaties.[218] Considering the provisions of individual environmental treaties, Solomon Islands noted that although a vast majority of such treaties are silent on the question, there are exceptions. First, treaties such as those establishing rules on civil liability for damage "include provisions excluding their operation to damage occurring as a result of war and

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basic proposition, one cannot, therefore, infer from general words, or a treaty of general application, a prohibitive rule of specific content that would have the effect of limiting the scope of otherwise permissible State conduct. It would be neither sound practice nor sufficient to rely upon general provisions of international law on human rights or the environment for the purpose of conjuring up a rule prohibiting the threat or use of nuclear weapons by way of legitimate self-defence. Written submission of the United Kingdom, supra note 215, at para. 3.88-3.89 (citing McNair, *The Law of Treaties* 463 (1961) ("Treaties ... are not to be understood as altering or restraining the Practice generally received, unless the Words do fully and necessarily infer an Alteration or Restriction". Both of these arguments rely on the underlying premise that environmental treaties apply during armed conflict.

[216] Government of the Solomon Islands, *International Court of Justice: Advisory Proceedings on the Legality of the Threat or Use of Nuclear Weapons* (*Question Posed by the General Assembly*): *Written Observations on the Request by the General Assembly for an Advisory Opinion*, 7 Criminal Law Forum 299, para 4.36 et seq. (1996) (Hereinafter "Solomon Islands brief").

[217] Solomon Islands brief, supra note 216, at para. 4.37 (citing IDI resolution, supra note 19, at art. 2). Continuously drawing on the IDI resolution, the brief continues that "a state of armed conflict 'does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty provides otherwise,' and, as regards the outbreak of an armed conflict between some of the parties to a multilateral treaty, 'does not ipso facto terminate or suspend the operation of that treaty between other contracting States or between them and the States parties to the armed conflict.' Treaties establishing international organizations are considered not to be affected by the existence of an armed conflict between any of its parties." Ibid. (citing IDI resolution, supra, at arts. 4-6).

[218] For example, the brief argues that principle 24 of the 1992 Rio Declaration, which provides that because "warfare is inherently destructive of sustainable development[,] States shall ... respect international law providing protection for the environment in time of armed conflict and cooperate in its further development, as necessary", shall be applicable in times of armed conflict. Ibid. (citing Rio Declaration on Environment and Development, principle 24, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Resolutions adopted by the Conference, resolution 1*, annex I, 31 ILM 874 (1992)) (noting that "[t]his approach is consistent with the rules of environmental protection provided by Articles 35 and 55 of the 1977 Geneva Protocol I"). The brief continued: "The support for the view that international obligations for the protection of human health and the environment survive the outbreak of hostilities is further reflected by the relevant provisions of Agenda 21, which call on the international community to consider measures in accordance with international law 'to address, in times of armed conflict, large-scale destruction of the environment that cannot be justified under international law.'" Both these United Nations Conference on Environment and Development (UNCED) texts imply that treaties protecting the environment should, as a general principle, continue to apply in times of war and other armed conflict. This conclusion can also be drawn from General Assembly resolution 47/37, which stressed that destruction of the environment not justified by military necessity and carried out wantonly was "clearly contrary to international law." In this resolution, the General Assembly further urged States to "take all measures to ensure compliance with the existing international law applicable to the protection of the environment in times of armed conflict."

armed conflict."[219] Second, some treaties permit their total or partial suspension at the instigation of one of the parties.[220] Third, some treaties apparently do not apply during armed conflict since their provisions do not apply to certain military operations in peacetime.[221] Fourth and contrary, some environmental treaties specifically apply during armed conflict.[222] Fifth, some such treaties implicitly apply during armed conflict.[223] The Solomon Islands brief concludes that "[t]he silence of the great majority of treaties intended to protect human health and the environment allows the conclusion that they are designed to ensure environmental protection at all times, in peace and in war, unless expressly excluded."[224]

62. The International Court of Justice stated in its opinion that the applicability of environmental treaties in times of armed conflict should be determined only in assessing what is necessary and proportionate:

> "[T]he issue is not whether the treaties relating to the protection of the environment are or not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict. The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to

[219] Ibid. at para 4.39 (citing Convention on Third-Party Liability in the Field of Nuclear Energy, 29 July 1960, art. 9, 956 *United Nations Treaty Series* 251; Convention on Civil Liability for Nuclear Damage, 29 May 1963, art. IV(3)(a), 1063 *United Nations Treaty Series* 265; International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, art. III(2)(a), 973 *United Nations Treaty Series* 3; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 18 December 1971, art. 4(2)(a), 1110 *United Nations Treaty Series* 57, 11 ILM 284 (1972) (which also does not apply to oil from warships used in non-commercial service); Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 1 May 1977, Art. 3(3), 16 ILM 1451 (1977); Convention on the Regulation of Antarctic Mineral Resource Activities, 2 June 1988, art. 8(4)(b), 27 ILM 868 (1988) (if no reasonable precautionary measures could have been taken) [hereinafter 1988 CRAMRA]; International Law Commission, draft Articles on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, art. 26(1)(a), *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 367.

[220] Ibid. (citing International Convention for the Prevention of Pollution of the Sea by Oil, 12 May 1954, art. XIX(1), 327 *United Nations Treaty Series* 3 (allowing parties to suspend operation of whole or part of Convention in case of war or other hostilities if they consider themselves affected as a belligerent or as a neutral, upon notification to the Convention's Bureau).

[221] Ibid. (citing London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 29 December 1972, art. VII(4), 1046 *United Nations Treaty Series* 120 (entered into force 30 August 1975) (non-applicability of Convention to vessels and aircraft entitled to sovereign immunity under international law).

[222] Ibid. (citing Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, 16 February 1976, annex I, 1102 *United Nations Treaty Series* 44, 15 ILM 300 (1976) (generally prohibiting dumping of materials produced for biological and chemical warfare); Protocol for the Prevention of Pollution of the South Pacific Region by Dumping, 25 November 1986, art. 10(1), (2) and annex I, 26 ILM 65 (1987) (prohibiting special dumping permits from being granted in respect of materials produced for biological and chemical warfare).

[223] Ibid. (citing International Convention for the High Seas Fisheries of the North Pacific Ocean, 9 May 1952, art. IV(2), 205 *United Nations Treaty Series* 65 (providing that Commission decisions should make allowance, inter alia, for wars, which may introduce temporary declines in fish stocks).

[224] Ibid.

protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality."[225]

63. In conclusion, the effect of armed conflict on environmental treaties has generated significant recent discussion by States, the International Court of Justice and commentators. While commentators are increasingly arguing that environmental treaties should be applicable during armed conflict, States are divided as to their applicability. The International Court of Justice has skilfully drawn a middle ground, holding in its advisory opinion on nuclear weapons that "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives."[226]

3. Extradition treaties

64. The effect of armed conflict on extradition treaties between belligerents is an unsettled area of law. On the one hand, extradition treaties primarily affect the rights of individuals, a characteristic generally favouring applicability during armed conflict as long as the treaty does not conflict with military strategy.[227] On the other hand, the "subject matter ... has clearly political aspects",[228] a characteristic which generally favours abrogation or at least suspension.[229]

65. Commentary and State practice reflect this competing logic. On the one hand, the Netherlands Special Court of Cassation has held that the outbreak of the Second World War abrogated a pre-war extradition treaty,[230] and a more recent decision of the Dutch Council of State reached the same result.[231] An Italian court has also held an extradition treaty to be terminated by the Second World War.[232] Courts in the United States of America, however, have held such treaties to be merely suspended,[233] and even held that "where the offenses were committed during a period of suspension ... extradition will be allowed when the treaty is revived."[234]

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[225] Ibid. at para. 30.

[226] Ibid.

[227] See supra notes 43-49 and accompanying text.

[228] Verzijl, supra note 6, at 386.

[229] See, e.g., Stone, supra note 2, at 450 (arguing that "the only safe course is to assume that ... extradition treaties ... are abrogated on the outbreak of war").

[230] Verzijl, supra note 6, at 386 (citing *In re Flesche*, AD 1949, Case No. 87 (27 June 1949)).

[231] *Rijn-Schelde Verolme NV v. State Secretary of Justice*, 74 ILR 118 (Netherlands, Council of State, Judicial Division, 20 December 1976).

[232] 1 *Italian Yearbook of International Law* 233 (1975) (citing *In re Barnaton Levy and Suster Brucker*, Court of Appeal, Milan (30 October 1970)).

[233] Verzijl, supra note 6, at 386 (citing *In re Argento*, 24 ILR 883, 241 F.2d 258 (1957); *In re D'Amico*, 28 ILR 602, 177 F. Supp. 648 (1959); *In re Gallina*, 31 ILR 356, 367, 177 F. Supp. 856 (1960)); *United States v. Deaton*, 448 F. Supp. 532 (1978) (holding pre-war extradition treaty suspended but not abrogated by the Second World War); *In re Ryan*, 360 F. Supp. 270, 272 n 4(2) (Eastern district of New York 1973). But see *Chandler v. United States*, 171 F.2d. 921 (1st Circuit Court 1948) (expressing doubts in dicta that the extradition treaty of 12 July 1930 between Germany and the United States had survived the Second World War).

[234] *In re Ryan*, supra note 233, at 272 n. 4(2) (citing *Gallina v. Fraser*, 177 F. Supp. 856, 864 (District of Connecticut 1959)). The American cases do sound a note of caution, generally holding that the decision between suspension and abrogation "can and must be decided against

The Supreme Court of Seychelles has also held that an extradition treaty was suspended and not abrogated.[235]

66. The views of commentators are also split between suspension and abrogation. McNair concluded that "in the absence of contrary provisions, express or implied, an extradition treaty between two States which find themselves at war with another is at least suspended for the duration of the war on the ground that the parties cannot have intended any other result; it may well be that it is automatically abrogated by the war."[236] Starke agrees, stating that "extradition treaties in the absence of any clear expression of intention otherwise, prima facie ... are suspended."[237]

4. Border-crossing treaties

67. Like extradition treaties, treaties allowing nationals reciprocal passage over a land border also have the hybrid quality of applying to private rights but implicating political concerns. The security concerns raised by border-crossing treaties, however, are greater than those relating to extradition treaties, and courts have been more likely to hold them to be abrogated by armed conflict. For example, the United States Supreme Court held in *Karnuth v. United States*[238] that a provision of the Jay Treaty of 1794, allowing reciprocal passage over the United States-Canadian border, was abrogated by the War of 1812,[239] "the first time an American court had held a

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the background of the actual conduct of the two nations involved, acting through the political branches of their governments." See, e.g., *Argento*, supra note 233, at 262 (6th Cir. 1957); *Deaton*, supra note 233, at 766.

[235] *R. v. Meroni*, Seychelles Supreme Court (16 October 1973), reported in 91 ILR 386-93 (1993).

[236] McNair, supra note 36, at 716.

[237] Starke, supra note 28, at 410.

[238] *Karnuth*, supra note 71. See also *United States v. Garrow*, 88 F.2d 318 (CCPA 1937), cert. denied 302 US 695 (1937) (lower court following the *Karnuth* decision). In Canada, compare *Regina v. Vincent*, 11 TTR 210 (Ont. Ct. App. 1993) (choosing to deny protection of the treaty through a reading of the treaty language itself rather than ruling on the effect of armed conflict on treaties). See generally Bryan Nickels, Note, *Native American Free Passage Rights under the 1794 Jay Treaty: Survival under United States Statutory Law and Canadian Common Law*, 24 British Columbia International and Comparative Law Review 313 (2001).

[239] *Karnuth*, supra note 71, at 241. Compare *In re McCandless v. United States*, 75 F.2d 71 (3d Cir. 1928). Although the fact scenario in *In re McCandless* was similar to *Karnuth*, the border-crosser in question was an Indian of the Iroquois tribe of the Six Nations. The Court held that article II of the Jay Treaty of 19 November 1794 giving Indians and British subjects from Canada freedom to pass and re-pass into the United States and to carry on trade there was not abrogated by the War of 1812, stating: "While it may be contended that in the nature of things treaties and treaty rights end by war, and if they are to again exist it must be by a new treaty, this reasoning does not apply to these Indians. If through the War of 1812 the Six Nations remained neutral, as they had through the Revolutionary War, there was no reason why either of the contending nations in 1812 should desire to change the status of the Six Nations and thereby anger and drive them into hostilities." Ibid. at 72. The Exchequer Court in Canada later considered the difference between *Karnuth* and *McCandless*, arguing that "there was no authority which stated or indicated that any distinction must be made between the members of an Indian tribe and other immigrants: the Jay Treaty of 1794 was held to have been nullified by the War of 1812 in respect of both categories of persons since, although Indians were wards of the Canadian Government, they were certainly within the category of citizens or subjects. *In re Francis v. The Queen*, 1955 ILR 591, 603, 4 DLR 760 (1955) (Canadian Supreme Court dismissed appeal on other grounds) (discussed in Verzijl, supra note 6, at 379-81).

treaty provision terminated by war."[240] Although this decision is often cited as a break with the Court's jurisprudence upholding reciprocal inheritance treaties,[241] it is better to acknowledge the unique political challenges that a treaty allowing border crossing presents. The United States Supreme Court has thus distinguished three potential levels at which treaties upholding private rights affect national policy: reciprocal inheritance treaties affect national policy the least, and have been held to continue during armed conflict; extradition treaties occupy a middle ground and have been held to be merely suspended; and treaties guaranteeing the private right to cross an international border during armed conflict have the largest effect on national policy and security, and have thus been held to be abrogated.[242] The Exchequer Court of Canada reached the same result on similar facts, holding in *Francis v. The Queen* that the border-crossing provision of the Jay Treaty had been abrogated by the War of 1812.[243]

5. Treaties of friendship, commerce and navigation

68. In certain countries, particularly the United States of America, the use of bilateral treaties of friendship, commerce and navigation (FCN) has become a common method to establish "the ground-rules governing day-to-day intercourse between two countries ... [and] secure reciprocal respect for their normal interests abroad, according to agreed rules of law."[244] The United States of America has entered into well over 100 such agreements, including 16 since 1946.[245]

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[240] McIntyre, supra note 7, at 48. See also *Meier v. Schmidt*, 150 Neb. 383, 34 N.W.2d 400 (1948), rehearing denied, 150 Neb. 947, 35 N.W.2d 500 (1948) (holding that a treaty provision providing for reciprocal access to the courts of justice to nationals of the United States and Germany was suspended but not abrogated by the Second World War). See additional border-crossing cases in the United States in McIntyre, supra, at 48-50. The United States Court of Customs and Patent Appeals later extended this decision to the Jay Treaty's customs duties exemption, holding that "the duty provision is logically dependent upon the free-passage provision ... Abolishing physical passage to prevent foreseeable intercourse destroys by necessity the abrogation of the duty exemption for personal goods." *Akins v. United States*, 551 F.2d 1222, 1229 (1977).

[241] See, e.g., Lenoir, supra note 42, at 133-35; McIntyre, supra note 7, at 48 (citing Garner, Harvard Research on the Law of Treaties, supra note 17, at 1187).

[242] This logic is exemplified by the Court's distinction between article III of the Jay Treaty (12 Bevans 13), providing border passage rights, and article IX of the same treaty, concerned with permanently vested property rights. *Karnuth*, supra note 71, at 239.

[243] *Francis v. The Queen*, supra note 239.

[244] Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 *Minnesota Law Review* 805 (1957-58). Walker explains that "In United States practice, although 'friendship' is attributed an honoured place in the title and although the conclusion of a treaty presupposes friendliness and good-will between the signatories, these treaties are not political in character. Rather, they are fundamentally economic and legal. Moreover, though 'commerce' and 'navigation' complete the title and accurately describe part of their content, their concern nowadays is only secondarily with foreign trade and shipping. They are 'commercial' in the broadest sense of that term, and they are above-all treaties of 'establishment,' concerned with the protection of persons, natural and juridical, and of the property and interests of such persons. They define the treatment each country owes the nationals of the other, their rights to engage in business and other activities within the boundaries of the former, and the respect due them, their property and their enterprises." Ibid. at 806.

[245] Ibid.

69. FCN treaties merit special examination as a changing area of international law. It was traditionally understood that treaties of a political[246] or commercial[247] nature would be abrogated or at least suspended. In fact, the United States Supreme Court held that "treaties of amity, of alliance, and the like, having a political character, the object of which is to promote relations of harmony between nation and nation are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war."[248]

70. A thorough examination of conflicts concerning FCN treaties, however, shows that they are often unaffected by armed conflict. For example, in the recent decision of the International Court of Justice in *Oil Platforms*,[249] the Treaty of Amity, Economic Relations and Consular Rights between the United States and the Islamic Republic of Iran[250] played a central role. Because the Islamic Republic of Iran's application to the Court relied on the compromissory clause included in the Treaty, it argued extensively that the Treaty was still in force notwithstanding the outbreak of hostilities in 1979. First, it argued that under the terms of the Treaty, termination was proper only through one year's written notice.[251] Second, it cited a white paper prepared by the Legal Adviser of the United States State Department for the United States Congress in October 1983 stating that "[b]ecause it has not been terminated in accordance with its terms of [sic] the provisions of international law, the Treaty of Amity remains in force between the United States and Iran."[252] Finally, the Islamic Republic of Iran pointed to multiple decisions of the Islamic Republic of Iran-United States of America Claims Tribunal, a decision of a United States federal district court and a decision of the International Court of Justice in a separate case that all held the Treaty to be in force after 1979.[253]

[246] See infra note 278.

[247] Traditional commentators believed that "the effect of the outbreak of war upon a pre-war commercial treaty between opposing belligerents is automatic abrogation." McNair, supra note 56, at 719. See also D. P. O'Connell, *Legal Aspects of the Peace Treaty with Japan*, 29 *British Yearbook of International Law* 427, 429 (1952) ("Generally speaking, it may be assumed that only political treaties which do not contemplate suspension during a state of war fail to revive on the conclusion of peace, but there is in addition a body of opinion in favour of the view that commercial treaties either lapse or may be annulled by declaration at the discretion of either party"). But see McNair, supra note 7, at 67 ("In 1941 the Department of State regarded as in force with one or more Axis Powers five treaties for the protection of nationals and their commercial activity in Africa"). For a more tempered view, see Tobin, supra note 23, at 82-87.

[248] *Ikeda*, supra note 71, at 237.

[249] *Oil Platforms (Iran v. United States)*, merits, para. 125 (International Court of Justice, 6 November 2003), 42 ILM 1334 (2003).

[250] Treaty of Amity, Economic Relations and Consular Rights, 15 August 1955, United States-Iran, 284 *United Nations Treaty Series* 93, 8 UST 899 (entered into force 16 June 1957).

[251] *Oil Platforms (Iran v. United States)*, written pleadings, Memorial of the Government Submitted by the Islamic Government of Iran, pp. 55-56, para. 2.03-2.04 (8 June 1993) (citing Vienna Convention on the Law of Treaties, supra note 3, at art. 54 (termination should take place "in conformity with the provisions of the treaty"). Available online at http://www.icj-cij.org/icjwww/idocket/iop/iopleadings/iop_ipleadings_toc.htm.

[252] Ibid. at p. 56, para. 2.05.

[253] Ibid. at pp. 56-57, paras. 2.06-2.07.

71. The Court followed this precedent and took the Treaty as applicable in *Oil Platforms*.[254] In fact, far from viewing the Treaty as abrogated or suspended, the Court based its very jurisdiction upon the Treaty of Amity.[255] The Treaty played an important part in the Court's merits decision as well: the Court held that the United States of America did not owe reparations because the attacks did not adversely affect freedom of commerce between the Islamic Republic of Iran and the United States of America as stipulated in the Treaty, even though the actions were not legitimate acts of self-defence under the United Nations Charter and customary international law.[256]

72. The International Court of Justice similarly based its jurisdiction on a treaty of Friendship, Commerce and Navigation in the case of *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*). Although a majority of the Court found that it had jurisdiction over the matter under the Statute of the Court itself,[257] an even larger majority found jurisdiction proper under the Treaty of Friendship, Commerce and Navigation of 1956 between the United States and Nicaragua.[258] As in the *Oil Platforms* case, the Court considered the Treaty of Friendship, Commerce and Navigation to be in force notwithstanding the armed conflict between the two parties and considered potential breaches of the Treaty in detail.[259] Whereas the Court concluded that the United States of America had breached the Treaty in several respects and ordered it to pay reparations, the United States refused to participate in the case beyond the jurisdictional phase,[260] did not comply with the reparation order[261] and denounced the Treaty of Friendship,

[254] See, e.g., report of the International Law Commission at its fifty-third session, supra note 101, at p. 178, n. 352 ("In *Oil Platforms*, it was not denied that the Treaty of Amity of 1955 remained in force, despite many actions by United States naval forces against Iran").

[255] Bekker, supra note 132, at 557 (noting that this "was the first ICJ case ever to rely exclusively on a compromissory clause in a bilateral commercial treaty to establish jurisdiction. In the light of this limitation, which sets the *Oil Platforms* case apart from the *Nicaragua* case, one might have expected the Court to engage in a straightforward exercise in treaty interpretation. Instead, the ICJ, in judging the legality of the U.S. actions, interpreted the applicable provisions of the 1955 Treaty ... directly in the light of the international law on the use of force in self-defence embodied in the UN Charter and customary international law, sources of law lying outside the ambit of the Treaty's specific jurisdictional grant").

[256] Bekker, supra note 132, at 550-51 (citing *Oil Platforms*, supra note 249, at para. 125).

[257] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*), *Jurisdiction and Admissibility*, *ICJ Reports 1984*, p. 392, 442 para. 113(1)(a) (judgment of 26 November) (11 votes to 5).

[258] Ibid. at para. 113(1)(b) (14 votes to 2).

[259] Ibid. at paras. 272-92. With respect to its ruling regarding the object and purpose of the Treaty of Friendship, Commerce and Navigation, however, the Court did not "consider that a compromissory clause of the kind included in article XXIV, paragraph 2, of the 1956 Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the Treaty of its object and purpose. It is only because in the present case the Court has found that it has jurisdiction, apart from Article XXIV, over any legal dispute between the Parties concerning any of the matters enumerated in Article 36, paragraph 2, of the Statute, that it can proceed to examine Nicaragua's claim under this head." *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*), merits, 1986 *ICJ Reports* 14, 136 para. 271 (judgment of 27 June).

[260] Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance, in the International Court of Justice at a crossroads* 288 (Lori F. Damrosch, ed., 1987).

[261] Ibid. at 289.

Commerce and Navigation under its terms.[262] This denunciation is in itself significant: if the United States of America had been of the view that the armed conflict had terminated the Treaty, it would not have felt obligated to follow the terms of the Treaty on formal denunciation.[263]

73. The vitality of FCN treaties during wartime is not limited to the modern era or to decisions of international tribunals. As far back as 1794, the United States Attorney General concluded that an American-led ransacking by a French privateer fleet of the British colony of Sierra Leone violated the Treaty of Amity with Britain, and that the victims thus had a civil remedy against the American leader under the Alien Tort Claims Act, a domestic statute providing jurisdiction for violations of the "laws of nations."[264] Opinions during the Second World War, on the other hand, are conflicting. Although Germany believed the FCN treaty between itself and the United States of America had lapsed during the Second World War, the United States Supreme Court based its seminal ruling in *Clark v. Allen* on that treaty.[265]

74. Because the FCN treaties were viewed as being in force during and after armed conflict in the overwhelming majority of cases outlined above, it is time to re-examine the traditional understanding that armed conflict abrogated all treaties of a political[266] or commercial nature.[267] In this regard, special attention should be paid to Oppenheim's approach, which distinguishes political treaties not creating a permanent regime, which have a greater chance of suspension, and political treaties creating a permanent regime, which have a lower chance of suspension. FCN treaties are testament to Oppenheim's more nuanced approach.

6. Intellectual property treaties

75. The vast majority of literature regarding the effect of armed conflict on intellectual property treaties concerns the two World Wars. During the First World War, a majority of belligerents viewed industrial property conventions as being suspended during the hostilities, but continued to honour any parallel domestic law.[268] The view as to literary and artistic property was slightly more tempered, and

[262] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Dissenting opinion of Judge Sir Robert Jennings, 1986 *ICJ Reports* 528, 538-39 (judgment of 27 June) ("Since [the judgment on jurisdiction], the United States has denounced the Treaty by a Note of 7 May 1985, giving the year's notice of denunciation required by Article XXV, paragraph 3, of the Treaty").

[263] The International Court of Justice similarly relied on the jurisdictional clause of the Treaty of Amity, Economic Relations and Consular Rights of 1955 between the United States and Iran in the *United States Diplomatic and Consular Staff in Iran* case. 1980 *ICJ Reports* 3, 26, para. 50 (judgment of 24 May).

[264] Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 *American Journal of International Law* 461, 488 n. 119 (1989).

[265] Renata Sonnenfeld, *Succession and Continuation, A Study on Treaty Practice in Post-War Germany*, 7 *Netherlands Yearbook of International Law* 91, 111 (1976) (citing *Clark*, discussed supra notes 46 and accompanying text).

[266] See infra note 278.

[267] For example, modern commentary by Professor Aust argues commercial treaties are either merely suspended or completely unaffected. Aust, supra note 28, at 244 ("Certain commercial treaties, such as air services agreements may be suspended. Treaties like investment protection agreements may not be suspended, given that their purpose is the mutual protection of national of the parties").

[268] Tobin, supra note 23.

such conventions even received several new signatories among belligerents during the war.[269] This distinction is logical, because with the latter "there is less chance that protecting the originator of the work will be prejudicial to the national interest."[270] During the Second World War, conventions for the protection of industrial property were regarded by the United States of America as in force "as far as its relations with the International Bureau were concerned", but nationals of belligerent States were not able to use them as an effective protection of their intellectual property, especially when national policy demanded the use of a belligerent national's work.[271] At least two other countries during the Second World War viewed such conventions as being suspended.[272] One could assume that lesser conflicts would not affect intellectual property rights of individuals as long as those rights were consistent with national policy during the armed conflict.

7. Penal transfer treaties

76. Like extradition treaties and border-crossing treaties, penal transfer treaties are yet another area of treaty law where private rights and government policy are simultaneously at issue. Related to extradition treaties, penal transfer treaties create a mechanism by which individuals already sentenced and imprisoned in a foreign country can be transferred to their home country for enforcement of the sentence. Although penal transfer treaties have not received significant commentary, Gregory Gelfand argues that "[u]nder general rules of international law, war between parties to a treaty suspends only the operation of treaties ... inconsistent with a state of war. A penal transfer treaty's objectives, however, require that it remain in effect, at least retrospectively, during hostilities. Prospective operation of such a treaty is inconsistent with a state of war, as States at war avoid unnecessary intercourse. Because the treaty would require consent to each transfer, it could not remain fully effective during hostilities. Nonetheless, the treaty should at least provide certainty where international law is unclear. Thus, it should require continued operation of previously incurred responsibilities in the event of war."[273]

[269] Ibid. at 108-112.

[270] Ibid. at 109.

[271] McIntyre, supra note 7, at 243-44. See also Verzijl, supra note 6, at 388 (citing decision of the English Patents Appeal Tribunal, 22 June 1959, ILR, vol. 30, pp. 54, 58 (holding wartime Germany remained party to intellectual property Convention but that the Convention was inoperative between Britain and Germany during the war). During the First World War, the German Reichsgericht went beyond this — albeit in dicta — suggesting that the intellectual property protections of the Paris Convention were still in force as to enemy nationals. *S.H.H. v. I.CH.*, 85 Entscheidungen des Reichsgerichts in Zivilsachen 374 (Reichsgericht, 1914) (reported in Briggs, supra note 28, at 934).

[272] Verzijl, supra, note 6, at 388 (citing Decision of Norwegian Court, 30 ILR, 33, 45 (11 July 1959) (holding the Paris Convention for the Protection of Industrial Property was suspended between Norway and Germany from 9 April 1940 to 28 February 1958); decision of the Exchequer Court of Canada, AD 1948, Case No. 135 (15 March 1948)).

[273] Gregory Gelfand, *International Penal Transfer Treaties: The Case for an Unrestricted Multilateral Treaty*, 64 *Boston University Law Review* 563, 603-04 (1984).

D. Treaties exhibiting a low likelihood of applicability

1. Treaties inapplicable through express provisions

77. Some treaties contain express provisions that armed conflict leads to the suspension or abrogation of some or all of their terms.[274] For example, the Chicago Convention on International Civil Aviation has a provision stipulating that "[i]n case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals."[275] In such cases, the express terms of the treaty will be applied and suspension or abrogation will occur.[276]

2. Treaties incompatible in practice

78. It is generally accepted that treaties which are incompatible with armed conflict are suspended during the period of incompatibility.[277] Formulating the parameters of incompatibility in the absence of an express provision is perhaps the most difficult question posed by the effect of armed conflict on treaties, but the present section can provide a few common examples to show the general trend. First, treaties of alliance not "concluded for the purpose of setting up a permanent condition if things" are at least suspended during armed conflict.[278] Second, a treaty

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[274] See, e.g., treaties cited in Tobin, supra note 23, at 41-49.

[275] Chicago Convention on International Civil Aviation, opened for signature 7 December 1944, art. 89, 15 *United Nations Treaty Series* 296, 61 Stat. 1180, TIAS No. 1591.

[276] See, e.g., Verzijl, supra note 6, at 374; Tobin, supra note 23, at 49.

[277] Delbrück, supra note 6, at 1369. See also ibid. at 1370 (arguing that "[t]here is widespread agreement that certain treaties ... are ... suspended between the belligerents ... [including treaties where] the belligerents [are] unable to fulfil their obligations because of the impact of war on the web of international intercourse").

[278] Oppenheim, supra note 29, at 303-04. See also Tobin, supra note 23, at 69 ("There appears to be almost unanimous acceptance among writers, both early and modern, of the theory that war terminates alliance as between opposing belligerents"). Commentators have classified such treaties under the somewhat imprecise term "political treaties." See, e.g., McNair, supra note 36, at 703; Aust, supra note 28, at 244; Tucker, supra note 28, at 501; McIntyre, supra note 7, at 53 ("It cannot be doubted that political treaties have traditionally been generally regarded as terminated as a result of war"); Stone, supra note 2, at 448 ("It is almost unnecessary to observe that [treaties of friendship and commerce or arbitration] are abrogated as between the belligerents from the outbreak of war"); O'Connell, supra note 247, at 429. For example, the Austro-Germano-Italian Dreibund treaty, a treaty of alliance "could not possibly remain in force after Italy's association with the warring Powers of the Entente against the Central Powers in 1915". Verzijl, supra note 6, at 371. McNair also includes treaties of neutrality, non-aggression, and disarmament in this group, noting that "if a neutral were a party, then the continued obligation of the treaty would probably depend upon other circumstances such as a change in conditions produced by the war". Ibid. Compare the treaties creating and guaranteeing the permanent neutralization of Switzerland, Luxembourg and Belgium, which are "certainly political but they were not abrogated by the outbreak of war because it is clear that their object was to create a permanent system or status". Ibid. See also Delbrück, supra note 6, at 1371 (arguing that "political treaties" are "generally considered to be terminated by the commencement of war" because they "depend on the existence of normal political and social relations between States for their proper function"); *Karnuth*, supra note 71, at 237 ("[T]reaties of amity, of alliance, and the like, having a political character, the object of which is to promote relations of harmony between nation and nation are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war"); McIntyre, supra note 7, at 52. Oppenheim's approach limiting the class of incompatibility to those treaties not setting up a

"seeking to hold constant a dynamic power relationship ... cannot remain effective during a war between the parties."[279]

IV. The effect of the Second World War on treaties

79. The present section considers the effect of the Second World War on treaties. Because of the sheer magnitude of the conflict, the Second World War certainly presents a unique case in the study of the effect of armed conflict on treaties.[280] This creates a paradox in utilizing the scholarly literature on the subject: although the effects of armed conflict on treaties received more attention from commentators[281] and courts[282] after the Second World War than in any other era, it would be disingenuous to develop standards of State practice directly from this literature without acknowledging the extremely special situation that a war of this magnitude entails, a special situation that has, thankfully, never presented itself again.

80. Despite the above caveat about the atypical magnitude of the Second World War, an examination of treaty practice during that conflict yields some very surprising results: Many fewer treaties were suspended than one might imagine, and, with respect to American practice, "[t]here is no instance in which the evidence is conclusive that the United States regarded any treaty as terminated by World War II."[283] The French similarly held, at least with respect to multilateral treaties, that if the war had any effect it was suspension, not termination.[284] The extensive commentary on the effect of the Second World War on treaties can be summarized as follows:

(a) After a thorough examination of multilateral treaties regarding "the conduct of war, public health, narcotics, labor, the control of liquor in Africa, slavery, the trade in white women, the suppression of obscene publications, and the

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permanent regime is consistent with the analysis supra that FCN treaties have often remained in force during armed conflict. See supra section III.C. This approach is superior to that of other commentators who view all treaties of alliance as a group.

279 McIntyre, supra note 7, at 85. See also Starke, supra note 28, at 409 ("Treaties between the belligerent States which presuppose the maintenance of common political action or good relations between them, for example, treaties of alliance, are abrogated").

280 McIntyre, supra note 7, provides an excellent and comprehensive analysis of the effect of the Second World War on treaties of the United States; McNair, supra note 36, at 727-28. Even prior to the World Wars, courts distinguished between wars that "operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations, [that is] ... public general war, [and] ... limited war ... similar to a prolonged series of reprisals." *Gray v. United States*, 21 Ct. Cl. 340, 374-75 (1886) (citing Wheaton's distinction between two classes of war. "A perfect war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case, and under every circumstance permitted by the general laws of war. An imperfect war is limited as to places, persons, and things." Lawrence's Wheaton, 518). For a detailed description of the distinction between "general war" and "limited war" in American practice, see J. Gregory Sidak, *To Declare War*, 41 *Duke Law Journal* 27, 56-62 (1991).

281 See, e.g., McIntyre, supra note 7; Rank (Part II), supra note 34; IDI study, supra note 18, at v. 59(1), p. 255.

282 See, e.g., *In re Meyer's Estate*, supra note 71; *Clark v. Allen*, supra note 144; *In re Knutzen's Estate*, supra note 144.

283 Ibid. at 340.

284 2 *Annuaire français de droit international* 727 (citing Court of Aix decision of 1951, catalogued in same journal, RDP 1953, p. 528).

safety of life at sea", McIntyre concludes that "it appears that none of [these treaties were] terminated by the war. On the contrary it appears that most of them, notably those for the conduct of war, narcotics control, labor, and the convention which created the International Office of Public Health, continued in force, perhaps in some respects even between the belligerents";[285]

(b) Treaties guaranteeing private rights to inheritance remained operative, but other treaty-created private rights were suspended, including freedom of movement, freedom from confiscation without compensation, the right of access to the courts by non-resident enemy aliens and reciprocal visa fee agreements;[286]

(c) The 1890 treaty providing for an international union for the publication of customs tariffs — the precursor to the General Agreement on Tariffs and Trade (GATT) and signed by almost all of the States in the world — "may have been suspended in some respects between some of the parties to it during World War II, but it appears to have returned to full force with the cessation of hostilities";[287]

(d) Finance conventions governing the payment of international debt were "never regarded ... as even suspended as a result of World War II, although actual payment may have been rendered impossible during the period of hostilities";[288]

(e) The view among States on intellectual property conventions was mixed, with the United States of America generally considering them still in force but with at least two other countries considering them suspended;[289]

(f) Multilateral maritime and air transport agreements were rendered essentially inoperative but remained legally in force;[290]

(g) Communications conventions also remained legally applicable, even if "some provisions [were] inoperative when direct relations with the enemy [were] called for";[291]

(h) Multilateral humanitarian conventions remained in force;[292]

(i) As to conventions on civil procedure, the Netherlands Supreme Court originally held that the Hague Convention on Procedure in Civil Cases of 1905 was suspended by the war, but the Court of Cassation "later narrowed the scope of the effect of war on treaties of this kind by holding that they are suspended only in so

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[285] McIntyre, supra note 7, at 88-157 (citation at 156). Noting the multilateral character and nature of the subject matter, McIntyre concludes that treaties on public health "unquestionably continued in legal existence, although they were apparently in part suspended by the war, even among the Allied powers". Ibid. at 103. In the area of narcotics control, multilateral treaties remained operative between all countries except Germany, where they were suspended; bilateral treaties between belligerents, however, "were at least suspended by the war, and it is possible they were terminated". Ibid. at 123-24. It is believed that treaties on labour rights remained in force, despite practical difficulties inherent to the war which made enforcement difficult or impossible, their multilateral character again regarded as important. Ibid. at 134.

[286] McIntyre, supra note 7, at 198, 203.

[287] Ibid. at 205-07 (noting the treaty's multilateral character).

[288] Ibid. at 214.

[289] See supra notes 271-272 and accompanying text.

[290] McIntyre, supra note 7, at 244-263.

[291] Ibid. at 283.

[292] Ibid. at 346.

far as, and as long as, their provisions cannot, in fact, be executed".[293] The District Court of Stuttgart held that the Hague Convention continued to be applicable between Switzerland and Germany.[294] The Canadian Department of Foreign Affairs viewed a bilateral agreement on civil procedure between itself and Italy to have been suspended by the Second World War;[295]

(j) In the area of conflict of laws, courts in both the Netherlands and Luxembourg held the Hague Conventions concerning Conflicts of Laws in Matters of Marriage, Divorce and Guardianship to be suspended but not abrogated; the Dutch Supreme Court later limited the suspension to provisions which had become unenforceable;[296]

(k) Regarding economic treaties, McIntyre emphasizes that "there was no case in which an economic treaty was definitely regarded by the United States as terminated by World War II" despite the widely held view that war abrogates treaties of commerce.[297] Multilateral economic conventions creating unions with bureaus, such as the postal and telecommunications unions, continued in force throughout the war, with belligerent, allied and neutral States as parties;[298]

(l) With regard to commercial arbitration, the Italian Court of Cassation held in 1971 that the Geneva Convention on Commercial Arbitration was not terminated by the Second World War because "[a] declaration of war only brought to an end those international conventions whose observance became absolutely and finally impossible as a result of the outbreak of hostilities and not those conventions whose observance only became temporarily impossible, which were merely suspended for the duration of the hostilities".[299] A British court held in 1977 that the Convention on the Execution of Foreign Arbitral Awards of 1927 was a "multipartite law-making treaty" and thus not terminated by the Second World War;[300]

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[293] Verzijl, supra note 6, at 388-89 (citing AD 1919-1942, Suppl. vol., Case No. 133; *Gevato v. Deutsche Bank*, ILR 1952 No. 13 (18 January 1952)).

[294] Ibid. at 389-90 (citing ILR 1951, Case No. 178).

[295] *Manitoba (Attorney General) v. Murray*, 2003 MBQB 67, 172 Man. R. (2d) 191, (2004) 1 WWR 158, para. 8 (2003) (reporting that the Director of the "Criminal Security and Treaty Law Division in the Canadian Department of Foreign Affairs and International Trade ... [advised] that the [Agreement on Legal Proceedings in Civil and Commercial Matters between Canada and Italy] was still in force and effect in Canada and in Italy, that it was suspended for a time during World War II but was reinstated in all provinces but Quebec in 1948 and was reinstated in Quebec in 1951").

[296] Verzijl, supra at 390 (citing decision of Netherlands District Court, AD 1947, Case No. 83 (5 February 1947); *In re Utermohlen*, AD 1947, Case No. 129 (Neth. Supr. Court, 2 April 1948); decision of High Court of Luxembourg of 20 January 1952).

[297] McIntyre, supra note 7, at 293-94.

[298] Ibid. at 295. See also ibid. at 344 ("No state lost membership in any of the international unions or bureaus. When any of the conventions on which they were based came to an end, it was because they were replaced by a subsequent convention").

[299] *Lanificio Branditex v. Societa Azais e Vidal*, 71 ILR 595 (Italy, Court of Cassation, Joint Sess., 8 November 1971).

[300] 48 *British Journal of International Law* 333-35 (1976-77) (citing Case No. 1, *Maximimport v. Scottish Mechanical Light Industries Ltd.*, 1976, reported in *Scots Law Times*, p. 245, Outer House, Lord Keith).

(m) Germany made a general statement following the Second World War "to the effect that it considered treaties signed before the outbreak of hostilities as suspended between the belligerents";[301]

(n) China, on the other hand, did not share the view held in Europe and the United States of America that treaties generally continued during the Second World War, or were at worst temporarily suspended. When China declared war on Japan on 8 December 1941, it formally declared "that all treaties with that country were abrogated".[302] The 1952 peace treaty concluding the war similarly emphasized that the war had rendered all treaties, conventions and agreements between China and Japan null and void.[303]

81. McIntyre concludes his analysis of the effect of the Second World War on treaties of the United States of America by highlighting the liberal attitude taken by the United States as to the effect of the war on its treaties, marking a partial reversal in the presumption that treaties were generally terminated by war.[304] In conclusion, although both World Wars should be analysed with caution because of the more expansive magnitude of conflict they present, a detailed study of the effects of the Second World War on treaties reveals that surprisingly few were suspended, and arguably none, barring a few exceptions, were terminated by the conflict.

V. Modern State practice

A. Selected countries

1. Greece

82. In one of the few examples of current State practice, the Greek High Administrative Court indirectly considered the effect of armed conflict on treaties on 5 October 2000 in the case *Appeal Against the Appointment of the Religious Muslim Leader in the Region of Xanthi (Mufti) of Mr. Mehmet Emin Sinicoglou*.[305] In that case, the Court upheld a 1991 law providing for the appointment of Muslim religious leaders (muftis), even though it contradicted a provision of the 1913 Treaty of Athens providing that muftis be elected. Treaties prevail over domestic laws in the Greek legal order, but the Court held that the Treaty of Athens was no longer in force. The primary reason for this holding is that the relevant provision of the Treaty of Athens had been abolished by the subsequent Treaty of Lausanne of 1923. The Court considered that, among other things, the "substantial and unpredictable" change of circumstances — due to the exceptional and important events, including the First World War, which took place between the signature of the Treaty of Athens and the conclusion of the Treaty of Lausanne — was an element of the

[301] Sonnenfeld, supra note 265, at 111 (citing communications of the Federal Ministry of Economic Affairs, as quoted in 18 Z.a.ö.R.V. 725 (1957-58)).

[302] Jerome Alan Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study* 1282 (1974).

[303] Ibid.

[304] Ibid. at 340.

[305] High Administrative Court (Third Section), on file with the Codification Division, United Nations.

determination of the intention of the contracting parties (Greece and Turkey) to abolish article 11 of the Treaty of Athens.[306]

2. France

83. According to a series of judicial opinions in France, it is not the effect of armed conflict itself but the mere declaration of war which can immediately affect treaty relations.[307] This teleological approach appears at odds with both the resolution of the Institut de droit international[308] and the theory elaborated in section II above that treaties are affected by armed conflict only when they are incompatible with national policy during the conflict.

3. Austria as permanent neutral

84. Stephen Verosta reports to the Institut de droit international that "[b]etween its liberation in 1945 and the conclusion of the Austrian State Treaty in 1955 Austria has, in principle, during armed conflicts continued its treaty-relations with both sides of the armed conflict. Having adopted on 26 October 1955 the international status of permanent neutrality, which subsequently was recognized by all States including the five permanent members of the Security Council, Austria has fulfilled and certainly will fulfill, should an armed conflict occur, its obligations under multilateral as well as under bilateral treaties in relation to its treaty-partners on both sides of the conflict, until supervening circumstances would make the performance impossible (art. 61, para. 1, Vienna Convention on the Law of Treaties). One could say that for Austria as a permanently neutral State the outbreak of hostilities as a rule had no effect on treaties. The Austrian courts, generally speaking, act in conformity with the legal standpoint of the government."[309]

4. Spain

85. In 1993, Spain suspended visa-waiver treaties with the Socialist Federal Republic of Yugoslavia, the former Yugoslav Republic of Macedonia and Bosnia and Herzegovina while that area was embroiled in armed conflict.[310] It remains to be confirmed if this action represents an effect of the Yugoslav conflict on these treaties or is better categorized as an effect of State succession on treaties.

5. Australia

86. Treatment of the topic by Australia in 1966 is emblematic of the changing nature of the effect of armed conflict in an era of less formalized or alternative forms of conflict, in this case the effect of the cold war on treaties. In response to a question about the relationship between Australia and China, the Australian

[306] Ibid.

[307] See *Jurisprudence française concernant le droit international publique*, 1 *Annuaire français de droit international* 500 (1955) (citing a current case in the Court of Appeal Aix following *Lovera c. Rinaldi*, RDP, 1952, p. 1105, n. 26 (22 June 1949); *Gambino c. Arcens*, RDP, 1955, p. 461, n. 38 (11 March 1953)). See additional cases cited in *Jurisprudence française concernant le droit international publique*, 3 *Annuaire français de droit international* 694 (1957).

[308] IDI resolution, supra note 19, at para. 2 ("The outbreak of armed conflict does not ipso facto terminate or suspend the operation of treaties in force between the parties to the armed conflict").

[309] IDI study, supra note 18, at v. 59(1), p. 255.

[310] See 10 *Anuario de Derecho Internacional* 487-88 (1994).

Ministry of External Affairs declared that "Australia is not in a state of hostilities with mainland China and we do not regard that country as being an enemy in that technical and legal sense", but emphasized that imports and exports of strategic materials would be subject to control.[311] If this control were carried out in the form of increased tariffs or duties, it would conflict with a trade treaty maintained by China and Australia at that time, which absolutely limited restrictive tariffs and duties.[312] Thus, it appears that even the cold war, a most diffuse, non-traditional form of inter-State conflict, can affect treaties.

6. United Kingdom of Great Britain and Northern Ireland

87. In reply to a question regarding what obligations the United Kingdom of Great Britain and Northern Ireland still had under the Nootka Sound Convention of 1790 towards former Spanish colonies, the British Minister of State wrote in 1983 that "the convention was terminated in 1795 as a result of the war between Britain and Spain".[313] Although this declaration deals with an armed conflict which occurred almost 200 years earlier, it was made in the context of a current armed conflict, the 1982 war between the United Kingdom of Great Britain and Northern Ireland and Argentina over the control of the Falkland Islands (Malvinas). After emphasizing that the 1795 war had terminated the Nootka Sound Convention, the British statement related this to the Falkland Islands (Malvinas): "In 1811 Spain evacuated the Falkland Islands (Malvinas) and abandoned them, so that, although the convention was revived in 1814, it could not then be taken to apply to the Falkland Islands/Malvinas."[314]

7. Seychelles

88. The Supreme Court of Seychelles considered the effect of armed conflict on treaties in a 1973 case involving the extradition of an Italian arrested in Seychelles. Counsel for the defendant argued that the relevant extradition treaty had been suspended by the Second World War and that on its revival it no longer applied to Seychelles, which had become a separate colony from Mauritius. The prosecution argued that the Second World War created an "automatic lapse" in the treaty, which revived as before at the war's conclusion, still applicable to Seychelles. The Court combined these two arguments, holding that the treaty was suspended by the war, but continued to apply to Seychelles after being revived by the peace treaty at the conclusion of the Second World War.[315]

8. Italy

89. The *Italian Yearbook of International Law* reports two relevant cases in the early 1970s. First, the Court of Cassation issued a judgment on the effects of armed conflict on treaties generally, holding that the effects of war are limited to

[311] *Australian Yearbook of International Law* 155-56 (1966).

[312] Exchange of notes annexed to the Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of China relating to the Chinese Customs Tariff, etc., art. 2, reported in 2 ATS 1929, 90 LNTS 337, entered into force for Australia 1 February 1929.

[313] 54 *British Journal of International Law* 370 (1983) (citing H. C. Debs., vol. 235, written answers, col. 275: 7 February 1983).

[314] Ibid.

[315] *R. v. Meroni*, Seychelles Supreme Court (16 October 1973), reported in 91 ILR 386-93 (1993).

suspending and not terminating treaties unless the treaty becomes "absolutely and finally impossible" to carry out.[316] The judgment is also significant because the court held that armed conflict "cannot bring about the extinction of treaties, but may contribute to a 'supervening impossibility' and perhaps to a change in the circumstances (*rebus sic stantibus*)".[317] Second, an Italian court held an extradition treaty to be terminated by the Second World War.[318]

9. Netherlands

90. The *Netherlands Yearbook of International Law* reports an incident of Dutch practice in 1982 in which civil strife in Suriname affected treaties between Suriname and the Netherlands, with the Netherlands suspending all such bilateral treaties under the doctrine of *rebus sic stantibus*.[319] Like the Australian example discussed above, the circumstances of the Dutch action exemplify the changing nature of armed conflict; in this case, a limited internal conflict had an effect on inter-State treaty relations.

10. Israel

91. The effect of armed conflict on the treaties of Israel was examined by Shabtai Rosenne, who reported to the Institut de droit international that "[a]s far as I can tell, the question [of the effect of armed conflict on treaties] has not really arisen for Israel, neither for the Courts nor for the Government. This is certainly a consequence of our position on the succession of Israel to the international treaties of Palestine, for that brought to an end from our point of view all possibility of the treaty relationships previously existing between Palestine and any of the Arab States with whom hostilities took place in 1948 and since, from becoming treaty relationships of Israel. In 1958, the Knesset (Parliament) passed the Obsolete Enactments (Repeal) Law, and among enactments of the Mandatory Government thus repealed was the Palestine-Syria and Palestine-Lebanon Customs Agreement (Validation) Ordinance, 1940. In the Explanatory Memorandum accompanying the Bill, the Government simply states that the 1940 Ordinance was no longer applicable."[320]

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[316] The Court stated that "a declaration of war only brings to an end those international conventions, observance of which would become absolutely and finally impossible as a result of the outbreak of hostilities; if, on the other hand, what is involved is merely temporary incompatibility limited in time to the duration of the hostilities in progress, the result is a more limited one: the effectiveness of the said conventions is simply suspended pending cessation of the state of war and the resumption of normal international relations." 1 *Italian Yearbook of International Law* 232-33 (1975) (citing *Lanificio Branditex v. Società Azais e Vidal*, Court of Cassation, Joint Sessions, No. 3147 (8 November 1971)).

[317] Ibid.

[318] *In re Barnaton Levy and Suster Brucker*, Court of Appeal, Milan (30 October 1970), reported in 1 *Italian Yearbook of International Law* 233 (1975).

[319] 15 *Netherlands Journal of International Law* 321 (1984).

[320] IDI study, supra note 18, at v. 59(1), p. 254 (citing *Yearbook of the International Law Commission*, 1950, vol. II, p. 206; *United Nations Legislative Series, Materials on the Succession of States*, p. 38 (1967); Shabtai Rosenne, *Israel and the International Treaties of Palestine*, 77 *Journal du droit international* 1140 (1950)).

B. Selected armed conflicts after the Second World War

1. Korea, 1950 to 1953

92. In June of 1953, forces of the Democratic People's Republic of Korea invaded the Republic of Korea, and in July of that year the United Nations Security Council recommended that United Nations Members assist the Republic of Korea in repelling the attack.[321] This began the Korean War, a large-scale conflict in which 16 countries contributed combat units and 5 countries contributed medical units on behalf of the United Nations.[322] Dietrich Schindler reported to the Institut de droit international that "we can assume that there were hardly any treaty relations, particularly no bilateral treaties, between the Northern and the Southern parts of [Korea] which could have been affected by the hostilities. As to the States which sent military forces to [Korea], the question whether [the Korean war] had any [effect] on their treaties needs a closer examination. One cannot assume, however, that there were any important effects."[323] No treaties existed between the Democratic People's Republic of Korea and the United States of America at the time the war broke out.[324] Although the effect of armed conflict on human rights treaties is now receiving increasing scholarly interest,[325] no binding human rights treaty had entered into force at the time of the Korean conflict.[326]

2. Suez Canal Base incident, 1956

93. In 1954, the United Kingdom of Great Britain and Northern Ireland and Egypt concluded the Suez Canal Base Agreement, which provided that "in the event of attack on any member of the Arab League by an outside power, excluding Israel, Egypt would allow the return of British forces to the Suez Canal Base."[327] In 1956, the United Kingdom and France launched an aerial bombardment of Egypt, and eventually landed ground troops. Egypt later asserted that this attack violated the Base Agreement and denounced the treaty.[328] Analysing this incident, Robert

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[321] 2 *Encyclopedia of the United Nations* 1230 (Edmund Jan Osmanczyk and Anthony Mango, eds., 2003) (hereinafter "*Encyclopedia of the United Nations*").

[322] Countries contributing combat units included Australia, Belgium, Canada, Colombia, Ethiopia, France, Greece, Luxembourg, the Netherlands, New Zealand, the Philippines, Thailand, Turkey, South Africa, the United Kingdom, South Korea and the United States. Medical units were provided by Denmark, India, Italy, Norway and Sweden. Ibid. at 1238.

[323] IDI study, supra note 18, at v. 59(1), p. 269.

[324] Michael K. Prescott, *How War Affects Treaties Between Belligerents: A Case Study of the Gulf War*, 7 EMORY *International Law Review*, 197, 198 (1993) (citing *UST Cumulative Index 1950-1970* (1971)).

[325] See supra sect. III.A.5.

[326] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 *United Nations Treaty Series* 85), entered into force on 26 June 1987. See *Status of Ratification of the Convention Against Torture*, online at http://www.ohchr.org/english/law/cat-ratify.htm. The International Covenant on Civil and Political Rights (999 *United Nations Treaty Series* 171) entered into force on 23 March 1977. See http://www.ohchr.org/english/law/ccpr.htm. The International Covenant on Economic, Social and Cultural Rights (993 *United Nations Treaty Series* 3) entered into force on 3 January 1976. See http://www.ohchr.org/english/law/cescr.htm.

[327] Layton, supra note 39, at 117 (citing Suez Canal Base Agreement of 1954, 210 *United Nations Treaty Series* 3 (No. 2833, 1955)).

[328] Ibid., citing also Lauterpacht, ed., *The Suez Canal Settlement: — A Selection of Documents* (1960); Mosfat, *The Suez Dispute*, 10 *Western Political Quarterly* 23 (1957).

Layton concludes that Egypt's denunciation of the treaty "rested upon the doctrine that breach by one state of the terms of an agreement affords the non-culpable state the right of denunciation. If the doctrine was correctly applied, the treaty came to an end because of the violation of its terms, rather than because of an inconsistency between its performance and the hostilities. It is therefore difficult to draw relevant conclusions from the incident."[329]

3. China and India, 1962

94. A border dispute between China and India "led to a brief military conflict in 1962 and the occupation by Chinese forces of areas in the Himalayas claimed by both countries."[330] Dietrich Schindler reported to the Institut de droit international with regard to this conflict that "since diplomatic relations between the two countries were not broken off there was probably no rupture of treaty relations either."[331]

4. India and Pakistan, 1965

95. In 1965, India and Pakistan became involved in "serious clashes along the border between West Pakistan and India in the Rann of Kutch Desert."[332] Schindler reported as to this conflict that "there was no effect on treaties in spite of Pakistan's claim that she was 'at war' with India",[333] citing an arbitration award of the International Chamber of Commerce, which states:

> "[N]one of the treaties concluded by India and Pakistan before September 1965 seems to have been considered, on either side, as cancelled; at least no contention and no evidence to that effect has been forthcoming from the Defendant. On the contrary, evidence may be found to show that both countries have viewed their treaties as still in force. On the claimant's side, reference was made to the fact that India continued to effect payments to Pakistan under the Indus River Treaty. It is common knowledge also that the Treaty concluded on June 30, 1965, in order to arbitrate the question of the Rann of Kutch, was finally implemented by both parties (if not actually during the hostilities, of course, but shortly after the Tashkent Declaration of January 10, 1966, i.e., on February 15, 1966). McNair writes on this point 'Both States apparently regarded the existing Kutch Arbitration Agreement between them as continuing in force, taking action under it in connection with the appointment of arbitrators.' Moreover, this view finds a confirmation in Article VI of the Tashkent Declaration, whereby the Prime Minister of India and the President of Pakistan agreed 'to take measures to implement the existing agreements between India and Pakistan' — and not, for instance, to 'revive' former agreements cancelled by a 'war'."[334]

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[329] Ibid.

[330] *Encyclopedia of the United Nations*, supra note 321, at v. 2, p. 984.

[331] IDI study, supra note 18, at v. 59(1), pp. 267-68.

[332] *Encyclopedia of the United Nations*, supra note 321, at v. 3, p. 1739.

[333] IDI study, supra note 18, at v. 59(1), p. 268.

[334] IDI study, supra note 18, at v. 59(1), p. 268 (citing award of 18 December 1967, reproduced in S. P. Sharma, *The Indo-Pakistan Maritime Conflict, 1965*, at pp. 107-123 (1970)). See also McNair and Watts, supra note 194, at 457-58.

96. Rather than taking this State practice to signify an evolution of the law away from the original premise that war ipso facto abrogates treaties, the arbitrator accepted this traditional premise and concluded that the absence of treaty abrogation could only mean that Pakistan and India did not, in fact, go to war.[335]

5. India and Pakistan, 1971

97. India and Pakistan fought a 12-day war in December 1971 in which "Indian forces occupied East Pakistan, which became the independent state of Bangladesh".[336] Schindler reported as to this conflict that he "did not find any indications as to its effects on treaties. Different from the 1965 conflict, diplomatic relations were broken off in this conflict between the two countries".[337]

6. Viet Nam War, 1957 to 1975

98. The Viet Nam War was "a military conflict fought in Vietnam from 1959 through 1975 between South Vietnam and the United States on one side and North Vietnam and the National Liberation Front (NLF) on the other side."[338] As with Korea, Dietrich Schindler noted that "we can assume that there were hardly any treaty relations, particularly no bilateral treaties, between the Northern and the Southern parts of [Viet Nam] which could have been affected by the hostilities. As to the States which sent military forces to [Viet Nam], the question whether [the Viet Nam war] had any [effect] on their treaties needs a closer examination. One cannot assume, however, that there were any important effects."[339] No treaties existed between North Viet Nam and the United States of America at the time because the United States did not recognize the North Vietnamese Government.[340] No binding human rights treaty had yet entered into force.[341]

7. Turkey and Cyprus, 1974

99. Tensions between Greece and Turkey reached a boiling point in 1974 when the Greek Cypriot organization EOKA overthrew the Government of Cyprus. Turkey reacted by landing troops and occupying portions of the island, quickly overtaking the newly installed regime.[342] Schindler reported as to this conflict that he was unable to find any "relevant information with regard to [the effect of armed conflict on treaties]."[343]

8. Soviet Union and Afghanistan, 1979 to 1989

100. In December 1978, Afghanistan and the Soviet Union signed a 20-year Treaty of Friendship.[344] Ironically, in response to a request from the Afghan Government

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[335] Ibid.
[336] *Encyclopedia of the United Nations*, supra note 321, at v. 2, p. 983.
[337] IDI study, supra note 18, at v. 59(1), p. 269.
[338] See online summary at http://www.questia.com.
[339] IDI study, supra note 18, at v. 59(1), p. 269.
[340] Prescott, supra note 324, at 198.
[341] See supra note 326. In addition, neither Viet Nam nor the United States had yet ratified the Genocide Convention. See *Ratification Status of the Convention on the Prevention and Punishment of the Crime of Genocide*, online at http://www.unhchr.ch/html/menu3/b/treaty1gen.htm.
[342] *Encyclopedia of the United Nations*, supra note 321, at v. 4, p. 2386.
[343] IDI study, supra note 18, at v. 59(1), p. 269.
[344] *Encyclopedia of the United Nations*, supra note 321, at v. 1, p. 13.

for military aid under the terms of that very Treaty, the Soviet Union sent 80,000 troops to Afghanistan, who ultimately supported the overthrow of the Afghan Government and occupied the country for 10 years.[345] There is little doubt that the Soviet intervention in Afghanistan affected the 1978 Treaty of Friendship, which assured mutual "respect for national sovereignty and territorial integrity, and non-interference in each other's internal affairs",[346] and required the two States to "safeguard the security, independence and territorial integrity of the two countries."[347]

101. The United States Department of State reports that it suspended its Fulbright exchange programme as a result of the Soviet invasion of Afghanistan,[348] thus affecting the treaty governing that programme in Afghanistan, which lacks any provisions concerning armed conflict.[349] It is unclear whether the suspension of the treaty was based on changed circumstances making it impossible to perform, or the armed conflict per se.

9. Islamic Republic of Iran-Iraq war, 1980 to 1988

102. A border dispute over the Shatt al-Arab waterway separating the Islamic Republic of Iran and Iraq escalated into full-scale war in the 1980s, in which "both sides attacked civilian targets, Iraq repeatedly used chemical weapons, and commercial shipping in the Gulf was attacked."[350] The war brought "the abrogation of the various treaties establishing the border between the two antagonists."[351] Despite the unilateral abrogation of boundary treaties by both sides leading up to and during the war,[352] it is the overwhelming view of commentators that "boundary agreements are recognized as belonging to that category of treaties which are not annulled upon the occurrence of war between two or more States."[353] The more

[345] Ibid. at 13-25.

[346] Afghanistan-USSR Treaty of Friendship, Good-neighbourliness and Cooperation of 1978, art. 1, 1145 *United Nations Treaty Series* 332, reported in *Encyclopedia of the United Nations*, supra note 325, at v. 1, p. 19.

[347] Ibid. at art. 4.

[348] Washington File, Fulbright Program Reestablished in Afghanistan (1 May 2003), online at http://usembassymalaysia.org.my/wf/wf050901.htm (accessed 8 November 2004).

[349] Agreement relating to the establishment of a Peace Corps programme in Afghanistan, exchange of notes at Kabul 9 and 11 September 1962, entered into force 11 September 1962, 461 *United Nations Treaty Series* 169, 13 UST 2100, TIAS 5169.

[350] *Encyclopedia of the United Nations*, supra note 325, at v. 2, p. 1161.

[351] Thomas Getace, book review: *The Shatt-al-Arab Boundary Question: A Legal Reappraisal*, by Kaiyan Homi Kaikobad, 85 *American Journal of International Law* 232, 233 (1991). See also Kaikobad, supra note 106, at 92-102.

[352] See, e.g., Kaikobad, supra note 106, at 79 (Iran unilaterally abrogates the Shatt-al-Arab Boundary Treaty of 4 July 1937, 190 LNTS 255, in April 1969); ibid. at 86 (Iraq abrogated the Baghdad Treaty of 13 June 1975, 1017 *United Nations Treaty Series* 136, establishing the boundary); ibid. at 102 (Baghdad Treaty has been "mutually transgressed" by both nations).

[353] Kaikobad, supra note 106, at 93; works cited supra note 106. After reviewing the literature on the effect of armed conflict on treaties, Kaikobad, writing during the Iran-Iraq conflict, concludes that even though both belligerents mutually transgressed the Baghdad Treaty of 1975 establishing the boundary, "this will not affect the territory allocated by the Baghdad Treaty. At the end of the war, and in the absence of an agreement to the contrary the [boundary as established by the Baghdad Treaty] will once again become operative as the international boundary between the parties. Both States will be free to conclude an agreement which either modifies the Baghdad Treaty in terms of relocation of the frontier, or reiterates the continuing validity of the said agreement, or to conclude no agreement regarding boundaries at all".

interesting legal question is what effect, if any, the war had on other treaties incidental to the boundary treaty, such as the Treaty Concerning the Use of Frontier Watercourses of 1975.[354] In that context, there does not seem to be any evidence of cooperation under the terms of this treaty since the o[illegible] of the Islamic Republic of Iran-Iraq war.[355] Nevertheless, at least one commentator has argued that it is still in force.[356]

10. Argentina and the United Kingdom of Great Britain and Northern Ireland, 1982

103. A long-dormant territorial dispute between Argentina and the United Kingdom of Great Britain and Northern Ireland over control of the Falkland Islands (Malvinas) erupted into a brief war in 1982 when "Argentina's military government invaded and occupied the islands."[357] The United Kingdom reacted with military force, and Argentine forces surrendered several months after the initial invasion.[358] The war over the Falkland Islands (Malvinas) had an effect on trade treaties between Argentina and the United Kingdom as well as between Argentina and third countries. At the United Kingdom's request, members of the European Community, Australia, New Zealand and Canada adopted trade sanctions including "a temporary prohibition on all imports of Argentine products, which ran contrary to article XI:1 and possibly article III of GATT. It was disputed whether the measures could be justified under the national security exception provided for in article XXI(b)(iii) of GATT. The embargo adopted by the European countries also constituted a suspension of Argentina's rights under two sectoral agreements on trade in textiles and trade in mutton and lamb, for which security exceptions of GATT did not apply."[359] It might be argued, however, that such trade restrictions are not an effect of the armed conflict on treaties but rather sanctions imposed on Argentina for its action in the Falklands Islands (Malvinas).

104. In addition, it was in the context of the Falklands Islands (Malvinas) conflict that the United Kingdom of Great Britain and Northern Ireland argued that the Nootka Sound Convention of 1790 regarding former Spanish colonies had been terminated by the war between Britain and Spain in 1795.[360] After establishing that the Convention had been terminated, the United Kingdom argued that upon its revival in 1814, it no longer applied to the Falkland Islands (Malvinas) because Spain had evacuated the Islands in 1811, during the period of suspension.[361] Thus, the Falkland Islands (Malvinas) conflict presents the unique case in which an armed conflict causes a State to argue that another armed conflict affected a treaty.

Kaikobad, supra at 102. See also *The Gulf War of 1980-1988* at 33-34 (Ige F. Dekker and Harry H. G. Post, eds., 1992) (arguing that the treaty system of 1975 is still in force after the war).

[354] Treaty Concerning the Use of Frontier Watercourses, 1017 *United Nations Treaty Series* 257, signed at Baghdad 26 December 1975, entered into force 22 June 1976.

[355] For a discussion of the effects of the conflict on the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, see supra notes 249-256.

[356] Dekker and Post, supra note 353, at 33.

[357] *Encyclopedia of the United Nations*, supra note 321, at v. 1, p. 698.

[358] Ibid.

[359] Report of the International Law Commission at its fifty-third session, supra note 101, at p. 352 (citations omitted).

[360] See supra, para. 87.

[361] Ibid.

11. Gulf war, 1991

105. The Gulf war was a "[m]ilitary operation ... conducted by an international force led by the United States, to put an end to Iraq's occupation of Kuwait".[362] It is important to the topic of the question of armed conflict on treaties for several reasons. First, a large number of opposing belligerents that maintained treaties with Iraq.[363] Second, the Gulf war created extensive scholarly debate as to the effect of armed conflict on environmental treaties, as discussed earlier in the present study.[364] Third, because both the economic sanctions[365] and military action[366] against Iraq were authorized by the United Nations Security Council, the conflict raises important issues of the effect on treaties of actions taken in relation to Chapter VII of the United Nations Charter.[367]

106. There would seem to be little doubt that the Iraqi invasion of Kuwait, which began the Gulf conflict, violated the treaty on friendly relations existing between the two nations.[368] Under that treaty, Iraq "recognize[s] the independence and complete sovereignty of the State of Kuwait" and agrees to "work towards reinforcing the fraternal relations subsisting between the two sister countries ... [and to] work towards establishing cultural, commercial, and economical co-operation between the two countries."[369] But, there is no evidence as to whether this treaty is considered suspended or terminated by the parties as a result of the armed conflict, and both the Security Council and the Secretary-General of the United Nations have continued to refer to some of its provisions.[370]

107. Many other adversaries of Iraq also maintained treaty relations with it in areas potentially incompatible with armed conflict, including, inter alia, the United States

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[362] *Encyclopedia of the United Nations*, supra note 321, at v. 2, p. 844.

[363] See Uppsala Conflict Database, Uppsala University Centre for Peace and Conflict Research, online at http://www.pcr.uu.se/database/index.php (listing the belligerents allied with Kuwait as Argentina, Australia, Bahrain, Bangladesh, Belgium, Canada, Czechoslovakia, Denmark, Egypt, France, Greece, Honduras, Italy, Morocco, the Netherlands, the Niger, Norway, Oman, Pakistan, Portugal, Qatar, Saudi Arabia, Senegal, Spain, Syria, the United Arab Emirates, the United Kingdom, the United States of America, Sierra Leone and Turkey).

[364] See supra sect. III.C.2.

[365] Security Council resolution 661 (1990).

[366] Security Council resolution 665 (1990) (authorizing military forces to secure effective implementation of sanctions); Security Council resolution 678 (1990) (authorizing Member States cooperating in Kuwait to use "all necessary means to uphold and implement resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the area").

[367] For a discussion of the effect on treaties of actions taken pursuant to Chapter VII of the United Nations Charter, see infra sect. VII.A.

[368] Agreed Minutes regarding the Restoration of Friendly Relations, Recognition and Related Matters, 485 *United Nations Treaty Series* 325, signed and entered into force 4 October 1963.

[369] Ibid. at paras. 1–3.

[370] Security Council resolution 833 (1993), fourth preambular paragraph ("Recalling ... that through the demarcation process the [United Nations Iraq-Kuwait Boundary Demarcation] Commission was not reallocating territory between Kuwait and Iraq, but it was simply carrying out the technical task necessary to demarcate for the first time the precise coordinates of the boundary set out in the 'Agreed Minutes between the State of Kuwait and the Republic of Iraq regarding the Restoration of Friendly Relations, Recognition and Related Matters' signed by them on 4 October 1963"); A/55/811, para. 4 (noting that the United Nations Iraq-Kuwait Observer Mission (UNIKOM) used the boundary established in the treaty on friendly relations as its reference).

of America, France, Australia, the Netherlands, Egypt, Canada, Czechoslovakia and Romania. In contrast to the conflicts in Korea and Viet Nam — where the United States of America maintained no bilateral treaties with the opposing belligerents at the time of its entry into the conflict — 13 bilateral treaties existed between the United States of America and Iraq during the 1991 Gulf war.[371] Iraq maintained bilateral treaties with the United Kingdom of Great Britain and Northern Ireland in areas as diverse as extradition;[372] civil procedure;[373] agriculture;[374] air services;[375] cooperation in education, science and culture;[376] and economic and technical cooperation.[377] France had nine bilateral treaties at the time of the outbreak of the

[371] United States State Department, 1 *Treaties in Force* 141-142 (2003), online at http://www.state.gov/s/l/24224.htm (citing Agreement Concerning Claims Resulting from Attack on the USS *Stark*, 27-28 March 1989, US-Iraq TIAS; cultural agreement, signed at Baghdad 23 January 1961, entered into force 13 August 1963, 488 *United Nations Treaty Series* 163, 14 UST 1168, TIAS 5411; customs agreements, 14 March, 15 May, 19 June, 8 August 1951, US-Iraq, 5 UST 657 (granting reciprocal privileges to consular officers to import duty-free articles for personal use); Agreement to Provide Educational Funding, 16 August 1951, US-Iraq, 2 UST 1908 (establishing the United States Education Foundation); Lend-Lease agreement, 31 July 1945, US-Iraq, 121 *United Nations Treaty Series* 239, 59 Stat. 1535, EAS 470, 9 Bevans 22 (Agreement applying to aid for defence); International Express Mail Agreement, 6 April 1989, US-Iraq, TIAS 11609; Agreement Relating to the Exchange of Official Publications, Exchange of notes at Baghdad, 16 February 1944, entered into force 16 February 1944, 109 *United Nations Treaty Series* 223, 58 Stat. 1253, EAS 403, 9 Bevans 14; Agreement for the Reciprocal Reduction of Passport Visa Fees for Nonimmigrants, 27 February 1939, US-Iraq, 9 Bevans 12; Agreement Relating to the Reciprocal Issuance of Nonimmigrant Passport Visas, Exchange of notes at Baghdad 6 June 1956, entered into force 6 June 1956, 275 *United Nations Treaty Series* 265, 7 UST 1067, TIAS 3587; Extradition Treaty, 7 June 1934, US-Iraq 170 LNTS 268); General agreement for technical cooperation, signed at Baghdad 10 April 1951, entered into force 2 June 1951, 151 *United Nations Treaty Series* 179, 3 UST 541, TIAS 2413, amended 18 December 1951 and 21 February 1952, 198 *United Nations Treaty Series* 225, 3 UST 4748, TIAS 2638; Commercial, economic and technical cooperation agreement, signed at Washington, D.C., 26 August 1987, entered into force 27 October 1987, TIAS 12020; extradition treaty, signed at Baghdad 7 June 1934; entered into force 23 April 1936, 170 LNTS 267; 49 Stat. 3380; TS 907; 9 Bevans 1).

[372] Bilateral extradition treaty, United Kingdom-Iraq, TS 13/1933 Cmd 4371 (2 May 1932), 141 LNTS 277, online at http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1044360289117.

[373] Convention Regarding Legal Proceedings in Civil and Commercial Matters, TS 8/1937 Cmd 5369, signed at Baghdad, 25 July 1935, ratifications exchanged at London, 18 November 1936.

[374] United Kingdom of Great Britain and Northern Ireland and Iraq: exchange of notes constituting an agreement regarding the changes which the Government of the United Kingdom has introduced in its production and trade policies relating to cereals, 689 *United Nations Treaty Series* 341, signed 18 March and 16 August 1965, came into force on 16 August 1965 by the exchange of the said notes.

[375] Agreement for air services between and beyond their respective territories (with annex and exchange of notes). Signed at Baghdad on 19 April 1951. 108 *United Nations Treaty Series* 121.

[376] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Iraq on cooperation in the fields of education, science and culture, 1352 *United Nations Treaty Series* 189, signed at London and came into force on 26 April 1983 by the exchange of the said notes.

[377] Agreement on economic and technical cooperation, 1316 *United Nations Treaty Series* 103, signed at London on 24 June 1981, came into force on 22 August 1981.

conflict,[378] including treaties covering trade,[379] technical cooperation[380] and cultural cooperation.[381] Treaties existed between Australia and Iraq in areas including extradition,[382] civil procedure,[383] war cemeteries,[384] and trade, economic and technical cooperation.[385] The Netherlands and Iraq maintained a treaty on cultural cooperation.[386] Egypt and Iraq maintained a treaty on air services.[387] Canada and Iraq maintained a treaty on trade and a treaty on economic and technical cooperation.[388] Czechoslovakia and Iraq maintained bilateral treaties on air transport[389] and consular relations.[390] It is difficult to imagine that such treaties could survive the conflict completely unaffected, but a thorough understanding of the effect of armed conflict on these treaties will be possible only with submissions from Governments. Yet a further relevant factor is to what extent any effects on these treaties were due not to the conflict itself but to the sanctions imposed on Iraq by the Security Council.[391]

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[378] See the *United Nations Treaty Series* search engine, online at http://untreaty.un.org/English/access.asp (accessed 8 November 2004).

[379] Trade Agreement, 754 *United Nations Treaty Series* 68, signed 25 September 1967, entered into force on 17 March 1969.

[380] Agreement on technical cooperation (with protocol and exchange of letters), 748 *United Nations Treaty Series* 206, signed 19 June 1969, entered into force on 31 December 1969.

[381] Agreement on cultural cooperation (with protocols and exchange of letters), 748 *United Nations Treaty Series* 156, signed 24 April 1969, entered into force on 15 December 1969.

[382] Extradition Treaty between the United Kingdom and Iraq, 141 LNTS 277, 1934 ATS No. 4, signed 2 May 1932, entered into force 5 May 1933. Australia acceded 31 August 1934; exchange of notes constituting an Agreement between the Governments of the United Kingdom of Great Britain and Northern Ireland, Canada, the Commonwealth of Australia and New Zealand, and the Government of Iraq regarding the Service of Documents, 197 LNTS 378, signed 8-28 February 1939, entered into force 8 February 1939.

[383] Convention between the United Kingdom and Iraq regarding Legal Proceedings in Civil and Commercial Matters, 176 LNTS 229, signed 25 July 1935, entered into force 18 December 1936. Australia acceded 7 October 1937.

[384] Agreement between the Governments of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, India and Pakistan and the Government of Iraq regarding War Cemeteries, Graves and Memorials of the British Commonwealth in Iraq resulting from the War of 1939-1945, amending Agreement of 15 March 1935, 108 *United Nations Treaty Series* 287, signed 18 February 1954, entered into force 15 June 1955. Agreement concerning the Mosul War Cemetery, 1648 *United Nations Treaty Series* 331, signed and entered into force 30 October 1989.

[385] Agreement on Trade, Economic and Technical Cooperation between the Government of Australia and the Government of the Republic of Iraq, 1217 *United Nations Treaty Series* 287, signed 11 March 1980, entered into force 29 April 1980.

[386] Agreement on economic and technical cooperation, 1458 *United Nations Treaty Series* 40, signed 31 October 1983, entered into force 1 September 1986.

[387] Agreement (with annex) for the establishment of scheduled air services between and beyond their respective territories, 311 *United Nations Treaty Series* 199, signed 23 March 1955, entered into force on 7 June 1956.

[388] Agreement on trade, economic and technical cooperation, 1471 *United Nations Treaty Series* 237, signed 12 November 1982, entered into force on 6 April 1983.

[389] Air Transport Agreement (with annex), 464 *United Nations Treaty Series* 278, signed 11 March 1960, came into force 22 August 1961.

[390] Consular Convention, 1486 *United Nations Treaty Series* 229, signed 16 August 1985, entered into force 2 April 1987.

[391] See Security Council resolution 661 (1990), supra note 365 (authorizing sanctions). For a specific example, the air treaties discussed in this section may have been affected not by the

12. Sierra Leone civil war, 1991 to 2001

108. In 1991, a rebel group known as the Revolutionary United Front (RUF) invaded Sierra Leone from Liberia and attacked two Sierra Leonean towns, beginning a conflict that would last a decade and result in tens of thousands of deaths.[392] A power-sharing agreement was signed between the Government and RUF on 7 July 1999 at Lomé, but conflict resumed soon thereafter, and this raised questions about the continuing validity of the Lomé Agreement.[393] The President of Sierra Leone, in an address delivered on 22 June 2000 at a national conference organized by the Sierra Leone Labour Congress, commented on the status of the Lomé Peace Agreement.[394] He accused RUF of failing to abide by the Agreement.[395] He stated:

> "We have consistently maintained that the Agreement is a comprehensive document, and that it should be seen as a whole. It was not signed for the sole purpose of granting the RUF amnesty or for giving its members cabinet and other high-level posts."[396]

The President then stated:

> "[W]e have every reason to renounce our obligations under the Agreement and unilaterally declare them null and void. However, it would be irresponsible on our part to do so. In fact, such a course of action would be detrimental to the safety and welfare of our people, and inconsistent with their desire, indeed their right, to live in peace and security.
>
> "I would therefore take this opportunity to announce that while in principle we remain committed to the Lomé Peace agreement, we reserve the right not to be bound by all its provisions. However, because it is an instrument for sustainable peace, and because it contains, generally speaking, strategies for achieving some of the principal objectives of our post-conflict programmes, we shall take a selective approach towards its implementation. From now on, we shall unilaterally, but carefully, make our own assessment of the situation and determine which of the provisions are still valid, those that have been rendered obsolete by recent developments and those that should, in the best interest of this nation be implemented.
>
> "We shall also set our own priorities. The security and humanitarian provisions of the Agreement will be our primary concern. For instance we attach special importance to the disarmament, demobilization and reintegration of ex-combatants — an activity which we had already launched long before the Lomé Reconstruction Programme. In this regard we have left the door open for ex-combatants, especially those of the RUF, who want real peace, to come forward now and take advantage of the DDR programme before it is too late.

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conflict itself but by the sanctions. See Security Council resolution 670 (1990) (authorizing suspension of air flights and landing rights as a mechanism to carry out the sanctions).

[392] See Uppsala Conflict Database, Uppsala University Centre for Peace and Conflict Research, online at http://www.pcr.uu.se/database/index.php.

[393] Ibid.

[394] Letter dated 23 June 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council (S/2000/620 and Corr.1).

[395] Ibid., p. 2.

[396] Ibid., p. 3.

> Their safety is assured. I should add here that we shall faithfully abide by the relevant provisions in the document for national reconciliation.
>
> "Implementation of article XVII of the Agreement, namely, the provision on the restructuring and training of a truly loyal national armed force, is also at the top of the agenda.
>
> "There was nothing really wrong with the Lomé Peace Agreement, per se. The problem was the lack of commitment on the part of Mr. Foday Sankoh and some members of the RUF leadership to fulfil their obligations under the Agreement."[397]

109. It is not clear whether the President's comments were a response to the resumption of armed conflict by RUF in violation of the Agreement or whether he was referring to a broader change of circumstances, including the introduction of United Nations peacekeeping troops. The President noted that:

> "The Agreement was reached in the context of certain subregional, regional and international imperatives. In other words, while it was an agreement between the Government and the RUF, it had international implications. Some of these have manifested themselves in actions already taken or now being contemplated by the international community, including the United Nations Security Council."[398]

13. Guinea-Bissau civil war, 1998

110. In 1998, Government loyalists staged a successful coup in Guinea-Bissau.[399] The United States of America reported that it suspended its Peace Corps programme in 1998 "as the result of fighting in the capital between rebel soldiers and government troops",[400] thus affecting the bilateral treaty governing the programme.[401] The Peace Corps is a United States Government programme established in 1961, which funds American volunteerism in Africa, Asia, the Caribbean, Central and South America, Europe and the Middle East.[402] As discussed in relation to this and other conflicts,[403] Peace Corps programmes are often suspended as a result of armed conflict, perhaps due to the nature of the Peace Corps, in which the United States of America provides a free aid programme to States; because the United States of America has funded and provided the programme, it does not hesitate to revoke it when its interests or the safety of its citizens are threatened.

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[397] Ibid., pp. 3–4.

[398] Ibid., p. 4.

[399] *Encyclopedia of the United Nations*, supra note 321, at v. 2, p. 844.

[400] Peace Corps Suspends Program in Guinea-Bissau, All Volunteers Evacuated Safely, Peace Corps press release (13 June 1998), online at www.peacecorps.gov.

[401] Agreement relating to the establishment of a Peace Corps program in Guinea-Bissau, exchange of notes at Bissau 12 and 15 January 1988, entered into force 15 January 1988, TIAS 12104.

[402] See www.peacecorps.gov.

[403] See infra notes 421 (Morocco), 422 (Jordan), 425 (Eritrea and Ethiopia), 520 (Somalia) and accompanying text.

14. Former Yugoslavia, 1998

111. With respect to the armed conflict in Croatia and Serbia beginning in 1991,[404] the International Law Commission reported:

> "In the autumn of 1991, in response to resumption of fighting within Yugoslavia, European Community members suspended and later denounced the 1983 Cooperation Agreement with Yugoslavia. This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in resolution 713 (1991) of 25 September 1991. The reaction was incompatible with the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice. Justifying the suspension, European Community member States explicitly mentioned the threat to peace and security in the region. But ... they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures."[405]

112. With respect to the internal armed conflict in Kosovo beginning in February 1996,[406] the International Law Commission reported:

> "In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban. For a number of countries, such as Germany, France and the United Kingdom, the latter measure implied the non-performance of bilateral aviation agreements. Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect."[407]

113. Both of these cases exemplify situations where internal armed conflict can have an effect on treaties with third States. What is not clear is to what extent the effects could be explained as the result of "fundamental change of circumstances" or "countermeasures" rather than the effect of armed conflict per se.

15. Afghanistan, 2001

114. Following the terrorist attacks of 11 September 2001 on the World Trade Center in New York and the Pentagon in Washington, D.C., and the Taliban's refusal to hand over terrorist leader Osama bin Laden, the United States of America and the United Kingdom of Great Britain and Northern Ireland led air strikes against Afghanistan in 2001.[408] At the time of the invasion of Afghanistan, the United States of America and Afghanistan maintained bilateral treaties relating to agriculture; cultural relations; defence; economic and technical cooperation; educational exchange; private investments; general relations; information media guarantees; narcotic drugs; the United States Peace Corps programme; exchange of

[404] See Uppsala Conflict Database, Uppsala University Centre for Peace and Conflict Research, online at http://www.pcr.uu.se/database/index.php.

[405] Report of the International Law Commission at its fifty-third session, supra note 101, at p. 354.

[406] See Uppsala Conflict Database, Uppsala University Centre for Peace and Conflict Research, online at http://www.pcr.uu.se/database/index.php.

[407] Report of the International Law Commission at its fifty-third session, supra note 101, at p. 353.

[408] *Encyclopedia of the United Nations*, supra note 321, at v. 1, p. 17.

official publications; relief supplies and packages; telecommunications; and rural health and development.[409] Notably, the treaty on private investments expressly provided for its continued applicability during war.[410] The treaty on educational exchange (Fulbright programme) had already been suspended because of the Soviet presence in Afghanistan in 1979, but it was officially reinstated soon after the close of the 2001 hostilities.[411]

115. Several United States allies also maintained multiple treaties with Afghanistan.[412] The United Kingdom of Great Britain and Northern Ireland and Afghanistan maintained treaties in the areas of financial and development assistance[413] and cultural relations.[414] It is difficult to imagine how the Cultural Convention — which promotes bilateral exchanges, for example, of researchers, scientists, scholars, youth, professors and athletic groups[415] — could have continued unaffected by the war in Afghanistan. A similar cultural agreement existed between Japan and Afghanistan.[416] Both Germany and Turkey maintained

[409] United States State Department, 1 Treaties in Force 1 (2003), online at http://www.state.gov/s/l/24224.htm. The *United Nations Treaty Series* search engine lists additional subsequent and additional treaties. See http://untreaty.un.org (accessed 8 November 2004). Some of these treaties, although technically "in force", were concluded with respect to relief supplies for a particular famine or commodity prices for a particular year. See e.g., Agreement Relating to a Loan for the Purchase of Wheat and Flour for Famine Relief in Afghanistan, 4 UST 2941, entered into force 8 January 1953; Agricultural Commodities Agreement, 579 *United Nations Treaty Series* 29, 16 UST 1078, entered into force 22 May 1965.

[410] Exchange of Notes Constituting an Agreement Relating to the Guaranties of Private Investments, United States-Afghanistan, 307 *United Nations Treaty Series* 97, para. c, signed 5 and 9 June 1957, entered into force 9 June 1957 ("[I]f the Government of the United States of America issues guaranties to cover losses by reason of war with respect to investments in Afghanistan, the Government of Afghanistan agrees that nationals of the United States of America to whom such guaranties have been issued will be accorded by the Government of Afghanistan treatment no less favourable than that accorded, in like circumstances, to its nationals or nationals of third countries, with reference to any reimbursement, compensation, indemnification or any other payment, including the distribution of reparations received from enemy countries, that the Government of Afghanistan may make or pay for losses incurred by reason of war; if the Government of the United States of America makes payment in U.S. dollars to any national of the United States of America under a guaranty for losses by reason of war, the Government of Afghanistan will recognize the transfer to the United States of America of any right, privilege or interest, or any part thereof, that such national may be granted or become entitled to as a result of the aforementioned treatment by the Government of Afghanistan").

[411] See supra note 348.

[412] The Uppsala conflict database lists the following as American allies: Australia, the Netherlands, the United Kingdom, Italy, Germany, France, Canada, Japan, Jordan, Poland, Turkey and the Russian Federation. See Uppsala Conflict Database, Uppsala University Centre for Peace and Conflict Research, online at http://www.pcr.uu.se/database/index.php (accessed 8 November 2004).

[413] See, e.g., Exchange of notes constituting an agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Afghanistan concerning financial assistance by the Government of the United Kingdom to the Government of Afghanistan, 1090 *United Nations Treaty Series* 352, signed 24 August and 30 September 1974, amended and came into force 26 February 1977. For a more complete list see *United Nations Treaty Series* online search at http://untreaty.un.org/English/treaty.asp.

[414] Cultural Convention, 633 *United Nations Treaty Series* 49, signed 19 April 1965, came into force on 30 November 1967.

[415] See Cultural Convention, supra note 414, at arts. 2, 4, 5, 7 and 8.

[416] Cultural Agreement, 827 *United Nations Treaty Series* 21, signed at Tokyo on 9 April 1969, came into force on 3 June 1971.

bilateral treaties with Afghanistan in the potentially incompatible area of air transport; neither treaty makes provision for the outbreak of armed conflict.[417] France and Afghanistan maintained a potentially incompatible treaty on road transport.[418] Canada and Afghanistan maintained a trade agreement guaranteeing reciprocal most-favoured nation status.[419]

116. Although one could speculate that the above-mentioned treaties may have been affected, there is no evidence to support this speculation, and input from the relevant States would be necessary before further conclusions could be drawn. An additional problem is that many of these treaties are old and could have been affected not by the 2001 invasion but rather by the 1978 Soviet invasion of Afghanistan.

16. Iraq war, 2003

117. Although the United States of America and its two principal allies in the 2003 invasion of Iraq — the United Kingdom of Great Britain and Northern Ireland and Australia — were all involved in the 1991 Iraq war,[420] there is little evidence of substantial changes in the treaty relations between these countries and Iraq between the two conflicts. It is of interest to note, however, that the war in Iraq caused the United States of America to suspend Peace Corps programmes in at least two other countries — Morocco[421] and Jordan[422] — thus affecting the treaties establishing these programmes.[423] This is an example of how the situation created by an armed conflict can sometimes affect treaties, even though the armed conflict itself may have no direct effect.

17. Ethiopia and Eritrea, 1998 to the present

118. Ethiopia and Eritrea went to war in 1998 "after Ethiopia accused Eritrea of invading the border town of Baume; at least 80,000 people were reported to have died in this war, which intensified in May 2000 when Ethiopian troops entered

[417] Air Transport Agreement (with exchange of notes), 464 *United Nations Treaty Series* 190, signed at Bonn 22 July 1959, came into force on 10 July 1961; Air Transport Agreement (with annex), 464 *United Nations Treaty Series* 50, signed at Ankara 8 February 1958, came into force on 17 May 1961.

[418] Convention concerning the international carriage of goods by road, 1128 *United Nations Treaty Series* 336, signed at Kabul on 17 April 1978, came into force on 30 November 1978.

[419] Trade Agreement, 978 *United Nations Treaty Series* 151, signed at Kabul on 27 November 1974, came into force on 27 December 1974.

[420] See Uppsala Conflict Database, Uppsala University Centre for Peace and Conflict Research, online at http://www.pcr.uu.se/database/index.php.

[421] Peace Corps Suspends Program in Morocco, Peace Corps press release (3 April 2003), online at http://www.peacecorps.gov (stating that the programme was suspended "to evaluate the political and public climate in Morocco as a result of the events in Iraq"). The programme was renewed in 2004. See Morocco Welcomes New Peace Corps Volunteers to Work in Health and Environment, Peace Corps press release (3 June 2004), online at www.peacecorps.gov.

[422] Peace Corps Suspends Program in Jordan, Peace Corps press release (23 November 2002), online at www.peacecorps.gov. The programme in Jordan was expected to reopen in 2004. Peace Corps Program to Reopen in Jordan, Peace Corps press release (22 July 2004), online at www.peacecorps.gov.

[423] Agreement relating to the establishment of a Peace Corps program in Morocco, exchange of notes at Rabat, 8 and 9 February 1963; entered into force 9 February 1963, 23 UST 209, TIAS 7297, amended 10 March 1972 (23 UST 209; TIAS 7297); Agreement concerning the program of the Peace Corps in Jordan, signed at Amman and entered into force 28 October 1996.

western Eritrea."[424] The United States of America reported that it suspended the Peace Corps programme in Eritrea in 1998 and Ethiopia in 1999 as a result of this conflict,[425] thus potentially having an effect on the bilateral treaties governing those programmes.[426]

18. Ethiopia and Somalia, present

119. Schindler reported that he was unable to find any "relevant information with regard to the armed [conflict] between ... Ethiopia and Somalia at present."[427]

VI. Relationship of the topic to other legal doctrines

120. Some commentators have questioned whether the effect of armed conflict on treaties is, in fact, a distinct legal problem.[428] The present section will confront this question by examining several related doctrines: *rebus sic stantibus*; State responsibility; necessity and proportionality; neutrality; impossibility; and the Martens Clause.

A. *Rebus sic stantibus*

121. Several commentators and at least one court have argued that the effect of armed conflict on treaties is similar or even identical to the doctrine of changed circumstances (*rebus sic stantibus*).[429] First, Benedetto Conforti has "long maintained ... that the effects of war on treaties are not of independent significance but instead constitute an application of the principle of *rebus sic stantibus*."[430] Second, the *Restatement of the Law, Third, of Foreign Relations Law of the United States* reported that "since the traditional effect of war on treaties derived from the fact that continuing treaty relations generally were deemed inconsistent with the state of war, perhaps as a special application of the doctrine of *rebus sic stantibus*, it is arguable that major hostilities are 'changed circumstances' providing a basis for suspending or terminating a treaty, regardless of whether there is a lawful state of war."[431] Third, McIntyre argues that "[t]he questions of the legal effect of war on

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[424] *Encyclopaedia of the United Nations*, supra note 321, at v. 1, p. 652.

[425] Peace Corps Suspends Program in Eritrea, All Volunteers are Safe and Sound, Peace Corps press release (5 June 1998), online at www.peacecorps.gov; Peace Corps Suspends Program in Ethiopia, All Volunteers Evacuated Safely to Kenya, Peace Corps press release (11 February 1999), online at www.peacecorps.gov.

[426] Agreement relating to the establishment of a Peace Corps program in Ethiopia, exchange of notes at Addis Ababa, 23 May 1962, entered into force 23 May 1962, 456 *United Nations Treaty Series* 293; 13 UST 1227; TIAS 5067; Agreement relating to the establishment of a Peace Corps Program in Eritrea, exchange of notes at Asmara 20 May 1994, entered into force 20 May 1994, TIAS 12103.

[427] ILC study, supra note 18, at v. 2(1), p. 294.

[428] See, e.g., Oliver J. Lissitzyn, book review, 45 *American Journal of International Law* 565, 566 (1951).

[429] See also Vienna Convention on the Law of Treaties, supra note 3, art. 62.

[430] Benedetto Conforti and Angelo Labella, *Invalidity and Termination of Treaties: The Role of National Courts*, 1 *European Journal of International Law* 44, 58 (1990) (citing Conforti, *Appunti sulla Lezione di Diritto Internazionale* 60 (1976), 105 (1982), 129 (1987)).

[431] *Restatement 3d*, supra note 79, at reporter's note 4, comment g. See also Tarassenko, supra note 70, at 65–66.

treaties is one aspect of the general problem of change in the international community, and it might be possible to consider the legal effect of war on treaties as a special case of *rebus sic stantibus*."[412] Fourth, Brownlie notes that "war conditions may lead to termination of treaties on grounds of ... fundamental change of circumstances."[413] Finally, the Italian Court of Cassation has reached a similar result in a judgment on the effects of armed conflict on treaties. It held that armed conflict "cannot bring about the extinction of treaties, but may contribute to a 'supervening impossibility' and perhaps to a change in the circumstances (*rebus sic stantibus*)."[414]

122. The *rebus sic stantibus* doctrine has been applied by States to armed conflict on at least three occasions. First, the French Foreign Ministry argued that war constituted a changed circumstance sufficient to terminate its adhesion to the obligatory jurisdiction clause of the Permanent Court of International Justice in 1939.[415] Second, the Court of Paris held that hostilities create a changed circumstance creating special rights and duties for the belligerent State.[416] Third, United States President Franklin D. Roosevelt invoked the *rebus* doctrine to suspend American obligations under the International Load Line Convention of 1930.[417] Because that case has been the subject of extensive commentary, it is discussed in more detail below to test the theory of the above commentators that *rebus sic stantibus* is applicable to situations of armed conflict.

123. The International Load Line Convention was a multilateral convention ratified or acceded to by 36 States that aimed "to promote safety of life and property at sea by establishing ... limits to which ships on international voyages may be loaded."[418] Faced with increased shipping needs during wartime, American President Roosevelt acted on the advice of acting Attorney General Francis Biddle[419] and declared that the Second World War constituted changed circumstances and that the Convention was "suspended or inoperative ... for the duration of the present emergency".[420] Although "[t]he action by the United States was followed in the war period by a number of other parties to the treaty",[421] it has been heavily criticized by commentators. Herbert Briggs argued that the doctrine of *rebus sic stantibus*, if it exists at all, is "clearly based juridically upon the intention of the parties at the time

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[412] McNair, supra note 7, at 23.

[413] Brownlie, supra note 26, at 642.

[414] Lanificio di Brusciano v. Zerilli and Ricchi e Fidel, supra note 116.

[415] Alexandre-Charles Kiss, *L'extinction des traités dans la pratique française*, 5 *Annuaire français de droit international* 364, 385 (1959).

[416] Ital. Living Overseas Ins. Co. (October 1940) (Compagnie Internationale des Wagons-Lits v. Société des Hôtels Réunis), *Revue critique* 71 (1940-46); Tribunal civil de la Seine, Réf. (8 January 1940) (Gaz. Pal., 22 February 1940), at 24 February 1940 (Gaz. Pal., 23 May 1940); Tribunal civil de Lille, réf., 16 November 1939 (Gaz. Pal., 1 February 1940).

[417] Herbert W. Briggs, *The Attorney General Invokes Rebus Sic Stantibus*, 36 *American Journal of International Law* 89 (1942); Rank, supra note 34, at 337-38. For additional uses of the doctrine during armed conflict, see Rank, supra at 338-339 n. 82.

[418] Ibid. at 91 (citing 40 *Opinions of the Attorneys General*, No. 24, p. 2).

[419] *Opinion of Acting Attorney General Francis Biddle on Suspension of the International Load Line Convention*, 40 *Official Opinions of the Attorneys General of the United States advising the President and Heads of Departments in Relation to their Official Duties* 319-24 (John T. Fowler, ed., 1946).

[420] *Department of State Bulletin*, 114 (1941); 6 Fed. Reg. 3499 (1941).

[421] McNair, supra note 7, at 26.

of the conclusion of the treaty", and that according to the terms of the Load Line Conventions, the parties' intentions were not to allow suspension due to war per se, but only as a result of notification of all other parties and subject to a one-year waiting period.[442] Briggs wrote: "It is clear that no provision of the treaty authorizes the action taken by the United States Government, which was neither a denunciation subject to one year's notice, nor a proposed modification in the line of an improvement, subject to unanimous acceptance."[443] He noted that the Harvard Research on the Law of Treaties, a principal source used by acting Attorney General Biddle to support suspension, clearly states that "the preponderance of opinion among [commentators on *rebus sic stantibus*] is that one party to a treaty may not, under the rule of *rebus sic stantibus*, unilaterally declare its obligations thereunder to have ceased to be binding".[444] Briggs concluded that "[t]he dangers inherent in a general resort by states to the doctrine of *rebus sic stantibus* for release from inconvenient treaty obligations could be no better illustrated than in the reasoning and methods employed by the Attorney General in this case".[445]

124. Professor Richard Rank also argued that the *rebus sic stantibus* doctrine does not justify the American action:

> "War might lead to changes that would justify invoking the theory of changed conditions. These changes, however, must meet the same requirements as any other changes in conditions. First, the changes in conditions must be fundamental, that is to say, those conditions on which the very existence of the treaty was based must have disappeared .... Second, the doctrine applies only to treaties of indefinite or perpetual duration that contain no express provision concerning the procedure by which they may be amended or abrogated. Third, the party wishing to invoke the doctrine to terminate the obligations of the treaty cannot denounce the treaty unilaterally, but must seek the consent of the other party or parties to its release. Fourth, without this consent, the party must submit his case to a competent international authority in order to secure recognition of the validity of his claim."[446]

125. In this case, Rank's third and fourth requirements were expressly contradicted by acting Attorney General Biddle, who argued that the United States of America could unilaterally declare the Convention suspended, without consulting the other parties involved.[447]

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[442] Briggs, supra note 437, at 90-91 (citing Chesney Hill, *The Doctrine of "Rebus Sic Stantibus" in International Law*, in 9 *University of Missouri Studies* 7 (1934)). See also Kiss, supra note 435, at 796-98 (providing extensive evidence that the *rebus sic stantibus* doctrine is not available.)

[443] Briggs, supra note 437, at 91.

[444] Briggs, supra note 437, at 94 (citing Harvard Research in International Law, *Law of Treaties*, supra note 17, at 1102. Citing also ibid. at 1124 (Professor Gutteridge concluded his survey of State practice stating "The principle is well established that one party to a treaty does not have the right to terminate its treaty obligations unilaterally merely upon the ground that it believes that the doctrine of *rebus sic stantibus* is applicable to the treaty.").

[445] Briggs, supra note 437, at 96.

[446] Rank, supra note 34, at 338-39.

[447] Acting Attorney General Biddle argued that "it may well be that ordinarily the procedure would call for the Government to inform the other parties to the treaty with respect to the matter and request agreement for termination or suspension of the treaty. The matter of procedure, however, does not affect the right of termination or suspension. Since a number of the contracting states have been overrun by military power, and normal international procedures, so far as here pertinent, are no longer available but are submerged in the swiftly changing conditions inherent

126. Amid this criticism, however, Rank did accept that the *rebus* doctrine could apply to armed conflict if all of the conditions of the doctrine are met, emphasizing that this doctrine could never result in automatic termination of treaties.[440] Applying Rank's conditions of the *rebus* doctrine to the situation of armed conflict yields interesting results. His first criterion for the *rebus sic stantibus* doctrine, that the very conditions on which the treaty was based have disappeared, seems quite consistent with the modern view on the effect of armed conflict on treaties "that provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected."[441] Rank's second criterion is consistent with the view examined in sections III.A.2 and III.D.1 above, that express provisions in treaties as to the outbreak of armed conflict will be honoured. An analysis of the true similarity between the effect of armed conflict on treaties and *rebus sic stantibus* should thus centre upon Rank's third and fourth criteria prohibiting unilateral suspension and requiring the party to submit the case to a competent international authority for review. If the effect of armed conflict on treaties differs from the *rebus* doctrine and does not include these two requirements — if it is automatic rather than invokable — then it is of very great legal significance, making this question one of the most important of all the questions that a study of the effect of armed conflict on treaties presents. Ironically, the question of whether the effect of armed conflict is invokable or automatic is one that has generated surprisingly little discussion among commentators.[442]

B. Circumstances precluding wrongfulness in the law of State responsibility

127. The chapter on circumstances precluding wrongfulness in the International Law Commission's articles on the responsibility of States for internationally wrongful acts codifies several doctrines which could also apply with regard to treaties during armed conflict, including self-defence (article 21), countermeasures (article 22), force majeure (article 23), distress (article 24) and necessity (article 25).[443] Yet the Commission's commentary on these articles is very clear that all such circumstances "do not annul or terminate the obligation, rather they provide a justification or excuse for non-performance while the circumstance in question

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[440] To the world situation, the procedure by prior justification and consent preferred by some of the authorities could not be followed." Opinion of Acting Attorney General Francis Biddle on Suspension of the International Load Line Convention, supra note 439, at 125.

[441] Rank, supra note 34, at 580-81. For a discussion of whether the effect of armed conflict on treaties is automatic or not, see infra section V.F.

[442] Bowett, supra note 139, at 241. See also Combacau, supra note 430, at 57-58.

[443] The one notable exception to the articles by Combacau and Labella, supra note 430, which argues that in fact all causes of treaty termination operate automatically. In order to establish that the *rebus sic stantibus* doctrine operates automatically, they first argue that the effect of armed conflict on treaties is automatic, and then argue that because the effect of armed conflict on treaties is merely a manifestation of *rebus sic stantibus*, then this latter doctrine must operate automatically as well. Ibid. at 57-63.

[444] Report of the International Law Commission on its fifth-third session, supra note 101, at pp. 199-200. This study does not discuss consent (article 20) or compliance with peremptory norms (article 26) because there would appear to be little occasion for these remaining two circumstances precluding wrongfulness to become relevant to armed conflict.

subsists."[452] Thus, the articles on circumstances precluding wrongfulness constitute a body of law dealing with responsibility for non-performance, not a law of treaties dealing with the status of treaties.

128. Despite this fundamental difference, the doctrines codified in the articles are examined briefly here because of their potential to provide guidance regarding the types of considerations that come into play when a State takes an action in violation of a treaty obligation. First, article 21 states that "[t]he wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations." The International Law Commission's commentary on that article begins by establishing that "a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph (4) [of the Charter]."[453] The commentary goes on, of relevance to the present study, to state that "[s]elf-defence may [also] justify non-performance of certain obligations other than that under Article 2, paragraph (4), provided that such non-performance is related to the breach of that provision."[454] As the commentary notes, this justification for non-performance creates a slippery slope because "[i]n the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at 'peace' with each other."[455] Although legitimate self-defence may justify non-performance of certain treaty obligations, it cannot be assumed that a claim of self-defence alone is a licence to cease any inconvenient treaty obligations.

129. Second, as to countermeasures (article 22), the International Law Commission's commentary is clear that this doctrine does not apply to cases of armed conflict.[456] Nevertheless, the structure of the countermeasures chapter could be instructive in relation to a formulation of the effect of armed conflict on treaties, particularly the following elements:

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[452] Ibid. at pp. 169-70, paras. (2)-(3) (citing *Gabčíkovo-Nagymaros Project* case (Hungary/Slovakia), *ICJ Reports* 1997, p. 7, at p. 39, para. 48, p. 63, para. 101 ("Even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with the treaty obligations revives.")). See also report of the International Law Commission at its fifty-third session, supra note 101, at p. 326, para. 4 ("Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State"); ibid. at p. 171, para. 4 (force majeure is an excuse for non-performance and cannot terminate or suspend treaties); ibid. at p. 181, para. (4) ("Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated").

[453] Report of the International Law Commission at its fifty-third session, supra note 101, at p. 177, para. (1).

[454] Ibid. at p. 178, para. (2).

[455] Ibid.

[456] Ibid. at p. 325, para. 3 ("[T]raditionally the term 'reprisals' was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach. More recently the term 'reprisals' has been limited to action taken in time of international armed conflict; i.e., it has been taken as equivalent to belligerent reprisals. The term 'countermeasures' covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter").

(a) Countermeasures must be "taken in such a way as to permit the resumption of performance of the obligations in question";[455]

(b) Countermeasures must not violate the United Nations Charter obligation to refrain from the threat or use of force, human rights obligations, humanitarian obligations prohibiting reprisals or peremptory norms;[456]

(c) Countermeasures must not interfere with any dispute settlement procedures or interrupt any diplomatic channels;[457]

(d) Countermeasures must be proportionate with the injury suffered;[458]

(e) Countermeasures must cease immediately when the internationally wrongful act has ceased.[459]

130. Although the law of countermeasures itself is inapplicable to situations of armed conflict, the above characteristics could prove relevant to the effect of armed conflict on treaties.

131. Third, regarding force majeure (article 23), although the International Law Commission's commentary indicates the applicability of the doctrine in some contexts of armed conflict,[460] it again reiterates that force majeure operates as an excuse for non-performance, not as an effect on treaties.[461] In this regard, the commentary distinguishes force majeure from the doctrine of impossibility:

> "While the same facts may amount, for example, to force majeure under article 23 and to a supervening impossibility of performance under article 61 of the Vienna Convention on the Law of Treaties, the two are distinct. Force majeure justifies non-performance of the obligation for so long as the circumstance exists, supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. Force majeure excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it."[462]

132. Thus, the force majeure doctrine can operate automatically but serves merely as an excuse for non-performance; the impossibility doctrine must be invoked, but serves to justify termination or suspension of the treaty itself. The question remaining with regard to the effect of armed conflict on treaties is whether it fits

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[455] Art. 49(1), reproduced in report of the International Law Commission on its fifty-third session, *supra* note 185, at p. 328.

[456] Articles on the responsibility of States for internationally wrongful acts, art. 50(1), reproduced in *The Work of the International Law Commission*, vol. I, pp. 372-83 (6th ed., 2004).

[457] Ibid. at art. 50(2).

[458] Ibid. at art. 51.

[459] Ibid. at art. 52(1), (3).

[460] Report of the International Law Commission on its fifty-third session, *supra* note 185, at p. 184, para. 3 (stating that the doctrine applies in cases of "human intervention, e.g., loss of control over a portion of the State's territory as a result of an intervention or occupation of an area by military operations carried out by a third State").

[461] Ibid. at p. 171, para. 4.

[462] Ibid.

one of these two paradigms, or whether it could both operate automatically and justify termination or suspension.

133. Fourth, distress (article 24) is a narrow doctrine applying only to "the specific case where an individual whose acts are attributable to the State is in a situation of peril"[467] and is "limited to situations where human life is at stake."[468] Distress generally involves "aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure."[469] The only case discussed by the International Law Commission's commentary outside this area was the *Rainbow Warrior* arbitration involving health concerns of two detained agents of France.[470] The doctrine thus seems quite distinct from the effect of armed conflict on treaties.

134. Fifth, the doctrine of necessity (article 25) precludes "the wrongfulness of an act not in conformity with an international obligation … [when it] is the only way for the State to safeguard an essential interest against grave and imminent peril, and does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."[471] Although the doctrine has been applied in the context of armed conflict,[472] it appears distinct from the effect of armed conflict on treaties because it applies in cases where "the peril [has] … not yet … occurred."[473] With the effect of armed conflict on treaties, by contrast, it is submitted that treaties are affected by either the past outbreak of hostilities or a present reality of the hostilities that is incompatible with national policy during the armed conflict.[474] Despite this difference, some aspects of the necessity doctrine could prove relevant to the study of the effect of armed conflict on treaties, particularly the use of negative language by the International Law Commission in framing its parameters to signal the rarity of its use.[475]

135. In conclusion, many of the provisions regarding circumstances precluding wrongfulness in the International Law Commission's articles on the responsibility of States for internationally wrongful acts raise issues somewhat similar to the question of the effect of armed conflict on treaties. This has led at least one commentator to conclude that "the most important approach to modify [treaties during armed conflict] is to rely on the justifications recognized in the general international law of state responsibility."[476] Adopting this approach, however, would deny any separate

[467] Ibid. at p. 189, para. 1.

[468] Ibid. at p. 192, para. 6. The commentary states that "more general cases of emergencies … are more a matter of necessity than distress." Ibid. at p. 193, para. (7).

[469] Ibid. at p. 189, para. 2.

[470] Ibid. at pp. 191-93, paras. 4-6 (citing *Rainbow Warrior (New Zealand/France)*, RIAA, vol. XX, p. 217 (1990), at pp. 254-55, para. 78).

[471] Articles on the responsibility of States for internationally wrongful acts, supra note 458, at art. 25(1).

[472] Report of the International Law Commission at its fifty-third session, supra note 101, at pp. 195-96, paras. 4-5 (describing application of the doctrine in the context of the Anglo-Portuguese dispute of 1832 and the *Caroline* incident of 1837).

[473] Ibid. at p. 203, para. 16. The ILC commentary also makes clear that the doctrine of necessity codified in article 25 is distinct from the doctrine of military necessity. Ibid. at p. 205, para. 20. This latter doctrine is discussed in the next section.

[474] See supra paras. 11-12.

[475] Articles on the responsibility of States for internationally wrongful acts, supra note 458, at art. 25(1) ("Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless …").

[476] Vöneky, supra note 119, at 30.

legal effect of armed conflict on treaties. This should be considered carefully, because the circumstances precluding wrongfulness do not directly affect (suspend or abrogate) the treaty itself, but rather serve as "a justification or excuse for non-performance while the circumstance in question subsists."[475] Hence, the relevance of circumstances precluding wrongfulness in the law of State responsibility to situations of treaties in armed conflict should be viewed with caution.

C. Necessity and proportionality

136. As discussed above,[476] the International Court of Justice has stated with respect to environmental treaties that "the issue is not whether the treaties ... are or not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict."[477] Unable to accept the proposition that an environmental treaty could bar a State of its right to self-defence, the Court concluded that self-defence is a right notwithstanding contradictory environmental treaties, but "[r]espect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality."[478] The Court's reasoning with regard to environmental treaties incompatible with military objectives could be expanded to all treaties which are incompatible with the maintenance of armed conflict. Under such a paradigm, treaties compatible with armed conflict would continue in force, and treaties incompatible with the conflict would continue to apply as an element in determining military necessity and proportionality.

D. Neutrality

137. The principle of neutrality has long been considered an important consideration when codifying the effect of armed conflict on treaties. For example, the Harvard Research on the Law of Treaties concluded that "[w]riters on international law are in substantial agreement that, in the case of multipartite treaties to which neutral States ... are parties, the outbreak of war between some of the parties does not ipso facto or otherwise terminate or even suspend the operation of such treaties as between the belligerent and neutral parties, nor, of course, as between the neutral parties themselves."[479] This view was reiterated by the United Nations after the Second World War in its study of the legal validity of undertakings concerning minorities. That study concluded that whereas most multilateral treaties are terminated by armed conflict, the presence of neutral States parties leads to mere suspension of multilateral treaties during armed conflict with automatic renewal at its conclusion.[480] McNair reached a similar conclusion with regard to the treaties of

[475] Report of the International Law Commission at its fifty-third session, supra note 101, at p. 169, para. 2.

[476] See supra, para. 62.

[477] *Legality of the Threat or Use of Nuclear Weapons*, supra note 84, at para. 30.

[478] Ibid.

[479] Harvard Research in International Law, supra note 17, at 1197-98.

[480] United Nations study on minorities, supra note 76, at 8. See also Delbrück, supra note 6, at 1370 (concluding that "treaties between belligerent and neutral States remain in force as a matter of course, since the commencement of war does not directly affect the legal relations between a belligerent and a neutral State").

the United Kingdom of Great Britain and Northern Ireland during the Second World War.[481] The relevance of neutrality law to the effect of armed conflict on treaties was also acknowledged by Schwarzenberger in 1967:

> "While, in relations between belligerents, the less stringent prohibitions of the laws of war replace those of the law of peace, the changes in relations between belligerent and non-belligerent Powers are less drastic. In principle, the law of peace continues to govern their relations. It is modified, however, by the law of neutrality: a set of enabling rules which give greater freedom to belligerent States and impose considerable duties of abstention on non-belligerent Powers. In the case of treaties between States which, subsequently, change into belligerent and neutral Powers, the typical intention of parties is that such treaties, especially those in the field of international economic law, should continue to apply, but subject to any overriding interests which arise from the position of the contracting parties as belligerent or neutral states."[482]

138. More recent commentary continues to acknowledge the importance of neutrality when studying the effect of armed conflict on treaties, but does not reach conclusive results. For example, the resolution of the Institut de droit international acknowledged the importance of neutrality without specifically dealing with it, stating "[t]his Resolution does not prejudge rights and duties arising from neutrality."[483] Similarly, the International Court of Justice emphasized the importance of neutrality law in its advisory opinion on nuclear weapons, stating that "as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict."[484] The principle of neutrality thus remains an important consideration in any formulation of the effects of armed conflict on treaties.

E. Impossibility of performance

139. The doctrine of impossibility of performance, as codified in the Vienna Convention on the Law of Treaties, article 61, allows a State to terminate a treaty in the case of a "permanent disappearance or destruction of an object indispensable for the execution of the treaty" or suspend a treaty in the case of a temporary impossibility.[485] Like the *rebus sic stantibus* doctrine discussed above, the

[481] McNair, *supra* note 36, at 726.

[482] Georg Schwarzenberger, *A Manual of International Law* 192 (1967).

[483] See, e.g., IDI resolution, *supra* note 19, at art. 10. This is unfortunate, because article 3 of the resolution essentially codifies the earlier findings of the United Nations study on reservations and the Harvard Research in International Law. See ibid. at art. 3 ("The outbreak of an armed conflict between some of the parties to a multilateral treaty does not [per se] terminate or suspend the operation of that treaty between other contracting States or between them and the States parties to the armed conflict.").

[484] *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 94, at para. 89.

[485] Vienna Convention on the Law of Treaties, *supra* note 2, at art. 61 (1). A party may not invoke impossibility if the "ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty." Ibid. at art. 61 (2).

impossibility doctrine closely parallels the developing rules on the effects of armed conflict on treaties. For example, in his provisional report to the Institut de droit international on the effects of armed conflict on treaties, Rapporteur Bengt Broms concluded that "[i]n so far as bilateral treaties are concerned the basic rule to be recommended seems to be that only a supervening impossibility of performance should lead to their suspension during the armed conflict."[486] Similarly, Sonnenfeld stated that when armed conflict affects a treaty, it "is not so much 'the fact that a war has broken out, but rather ... the impossibility to implement the treaty, owing to the change in the conditions which presided over its conclusion'" which affects the treaty.[487] But, as with *rebus sic stantibus*, it is submitted that the impossibility doctrine must be invoked; it is not automatic. It is still an open question whether the effect of armed conflict on treaties operates automatically — thus distinguishing it from these other doctrines — or whether it must also be invoked by the States parties concerned.

F. Martens Clause

140. Originally appearing in the preamble to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land,[488] and restated in all four of the Geneva Conventions,[489] their Additional Protocols[490] and the preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons,[491] the Martens Clause provides that the "dictates of public conscience"[492]

[486] IDI study, supra note 18, at v. 59 (1), p. 218.

[487] Sonnenfeld, supra note 265, at 109 (citing Nahlik, *Introduction to the Science of International Law* 301 (Warsaw, 1967).

[488] Tarasofsky, supra note 70, at 32 (citing J. B. Scott, *The Hague Conventions and Declarations of 1899 and 1907*, p. 100 (1915).

[489] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 63, 75 *United Nations Treaty Series* 31, 6 UST 3114; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, art. 62, 75 *United Nations Treaty Series* 85, 6 UST 3217; Convention Relative to the Treatment of Prisoners of War, 12 August 1949, art. 142, 75 *United Nations Treaty Series* 135, 6 UST 3316; Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 158, 75 *United Nations Treaty Series* 287, 6 UST 3516.

[490] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, art. 1 (2), 1125 *United Nations Treaty Series* 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, opened for signature 12 December 1977, preamble, para. 4, 1125 *United Nations Treaty Series* 609.

[491] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, preamble, para. 5, 1342 *United Nations Treaty Series* 137.

[492] The 1899 Martens Clause reads, "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience." Reproduced in Tarasofsky, supra note 70, at 33. A few words are changed in the 1907 version, but the meaning is essentially unaltered. See Theodor Meron, *The Martens Clause, Principles of Humanity and Dictates of Public Conscience*, 94 *American Journal of International Law* 78, 79 (2000). In the Geneva Conventions and their Optional Protocols, the goal of the Clause is

as they may have developed in customary law create additional protection to populations and belligerents which "will still apply for states no longer bound by the Geneva Conventions as treaty law".[493]

141. The Nuremberg Tribunal confirmed the legal significance of the clause and emphasized that it was "much more than a pious declaration".[494] The International Court of Justice has stated that the clause itself forms part of customary international law.[495] Some scholars argue that the "dictates of public conscience" provision of the Martens Clause includes environmental concerns as codified in environmental treaties.[496] Other scholars[497] and Governments,[498] however argue that the Martens Clause should not be given an overextended interpretation.

142. The International Court of Justice made clear in the *Nicaragua* case that "even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence."[499] For the purposes of the present study, the question is whether the Martens Clause actually has a legal effect on treaties representing the "dictates of public conscience" — making the treaties themselves apply during armed conflict[500] — or if it merely influences the extent to which these treaties will become customary international law applicable during armed conflict, a unique source of law, without actually applying themselves. The wording of the Martens Clause in the 1949 Geneva Conventions and 1977 Additional Protocols supports the

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focused on ensuring that humanitarian law applies as customary international law even to a State which attempts to denounce humanitarian law conventions. See Meron, supra, at 80-81.

[493] Meron, supra note 492, at 80.

[494] Ibid., at 80 (citing *In re Krupp* and others, 15 AD 620, 622 (US Mil. Trib. 1948)).

[495] Nuclear weapons advisory opinion, supra note 84, at para. 84.

[496] Tarasofsky, supra note 70, at 35; Chinkin, supra note 15, at 25; Simonds, supra note 113, at 188; Bothe, supra note 199, at 56.

[497] For a forceful critique of the Martens Clause, see Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 *European Journal of International Law* 187 (2000). See also Meron, supra note 492, at 88 ("Nevertheless, the Martens clause does not allow one to build castles of sand. ... [P]rohibitions of particularly objectionable weapons and methods of war can better be attained by applying such generally accepted principles of humanitarian law as the requirements of distinction and proportionality and the prohibition of unnecessary suffering than by pushing the Martens clause beyond reasonable limits").

[498] The United States Department of the Army stated in a publication that "such broad phrases in international law are in reality a reliance upon moral law and public opinion". 2 *United States Department of the Army, International Law* 15 (No. 27-161-2-1962) (cited in Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 36 (1989)).

[499] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), judgment, ICJ Reports* 1986, p. 14, at 95, para. 178.

[500] This appears to be the position of Solomon Islands and Australia in the nuclear weapons advisory opinion of the International Court of Justice. Both States invoked the Martens Clause and used both international human rights treaties and environmental treaties to argue for the illegality of nuclear weapons from an environmental and human rights standpoint. See supra notes 216-224 and accompanying text (discussing the written submission of Solomon Islands); Meron, supra note 492, at 84 (citing International Court of Justice — requests for advisory opinions on the Legality of Nuclear Weapons — Australian statement, 1996, *Australian Yearbook of International Law* 685, 699-703) (discussing the oral submission of Australia).

view that its purpose is to clarify that customary international humanitarian law applies during an armed conflict,[501] guiding the jurist to look for this law in the "dictates of public conscience", but what is the resultant effect on treaties codifying this public conscience? Even though environmental and human rights law would apply, they would do so as customary international law; the question of whether the treaties themselves apply during armed conflict would remain unanswered.

VII. Other contemporary issues

A. Armed conflict within Chapter VII operations

143. Treaty obligations existing between Member States of the United Nations which are "inconsistent with enforcement measures taken pursuant to a Security Council decision need not be observed by cooperating member states".[502] Jessup wrote that "[i]t cannot be doubted that action taken by a Member [State of the United Nations] in compliance with [a decision of the Security Council under Chapter VII of the United Nations Charter] would constitute justification for any incidental breach of a treaty obligation calling for freedom of commercial intercourse or of communications."[503] Similarly, Goodrich and Hambro have noted that

> "it may happen that ... other international agreements such as trade agreements and postal conventions will be violated by the action required to give effect to the Council's decision [under Chapter VII] ... The ... situation is squarely faced by the Charter. Article 103 provides that in case of conflict between the obligations of Members under the Charter and under international agreements, the former will prevail."[504]

144. An examination of the *travaux préparatoires* of the United Nations Charter indicates without doubt that the drafters intended Article 103 to apply not only to the Charter itself, but also to applications of the Charter such as under Chapter VII. When Norway, at the San Francisco Conference, introduced a proposed addition to the section which eventually became Article 41 clarifying that action taken under it "takes precedence over the execution of stipulations contained in commercial or other treaties",[505] discussion was reserved until the Committee on Legal Problems, in charge of drafting Article 103, could consider the issue.[506] That Committee stated in its report that in applying Article 103,

> "it is immaterial whether the conflict arise because of intrinsic inconsistency between the two categories of obligations [i.e. inconsistency between a treaty

[501] Meron, supra note 492, at 87 ("It is generally agreed that the clause means, at the very least, that the adoption of a treaty regulating particular aspects of the law of war does not deprive the affected persons of the protection of those norms of customary humanitarian law that were not included in the codification").

[502] Layton, supra note 39, at 112.

[503] Jessup, *A Modern Law of Nations* 153 (1948) (cited in Layton, supra note 39, at 112).

[504] Goodrich and Hambro, *Charter of the United Nations* 278 (1949) (cited in Layton, supra note 39, at 112).

[505] Layton, supra note 39, at 110 (citing doc. 289, III/3/11, 12 *United Nations Conference on International Organization Documents* 607 (1945)).

[506] Layton, supra note 39, at 111.

and the Charter itself] or as a result of the application of the provisions of the Charter under given circumstances, e.g., in the case where economic sanctions were applied against a state which derives benefits or advantages from previous agreements contrary to said sanctions."[507]

145. Thus, the drafters of the Charter made it absolutely clear that obligations taken in application of Chapter VII shall prevail[508] over obligations under any other international agreement.[509] The IDI resolution on the effects of armed conflict on treaties dedicated one of its 11 substantive articles to the question, stating that "[a] State complying with a resolution by the Security Council of the United Nations [under Chapter VII of the Charter] shall either terminate or suspend the operation of a treaty which would be incompatible with such resolution."[510] Against this background, it has been recently argued that because Chapter VII operations "are intended to restore the legal order, they are considered as suspending treaty obligations only in cases where the use of force renders their execution impossible in fact".[511]

B. Domestic hostilities

146. If the effect of armed conflict on treaties remains a vague area of international law, the effect of domestic hostilities on treaties is even more so.[512] But, in the light of the "staggering increase in civil wars",[513] which now make up the vast majority of all armed conflicts in the world, any complete study of the effects of armed conflict on treaties cannot ignore domestic hostilities.

147. The most important point to be established is that domestic hostilities can and do affect international treaties. Although scholars regularly consider both the

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[507] Ibid. (citing Report of the Rapporteur of Committee IV/2, doc. 933, IV/2/42, 13 *United Nations Conference on International Organization Documents* 707-08 (1945)).

[508] Layton notes that Article 103 does not provide for automatic abrogation of conflicting treaties, but rather that Charter obligations "shall prevail". The Committee on Legal Problems, drafting Article 103, "decided that it would be inadvisable to provide for the automatic abrogation by the Charter of obligations inconsistent with the terms thereof. It has been deemed preferable to have the rule depend upon and be linked with the case of a conflict between the two categories of obligations. In such a case, the obligations of the Charter would be pre-eminent and would exclude any others". Layton, supra note 39, at 111 (citing Report of the Rapporteur of Committee IV/2, supra note 507).

[509] Layton notes, however, that "a significant problem with the Charter formula lies in the determination of when a 'conflict' between the two sets of obligations arises". Layton, supra note 39, at 113.

[510] IDI resolution, supra note 19, at art. 8.

[511] Delbrück, supra note 6, at 1372. See also *Encyclopedia of the United Nations*, supra note 321, at v. 3, p. 2141 (describing the suspension of Chapter VII operations in Somalia as a result of overwhelming interference with United Nations activities at the hands of Somali rebels. Thus, in this case domestic hostilities presumably had an effect on the treaty establishing a United Nations peacekeeping operation).

[512] A. Graham, *The Effects of Domestic Hostilities on Public and Private International Agreements: A Tentative Approach*, 3 *Western Ontario Law Review* 128, 148 (1964) ("The problem of the effect of a revolution on treaties ... has not received adequate discussion ... [T]here remains a void in International Law in this respect").

[513] Antonio Cassese, *A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict*, in *The New Humanitarian Law of Armed Conflict* 461, 461-62 (Antonio Cassese, ed. 1979).

application of IHL[514] and human rights law[515] to domestic hostilities, it would be a mistake to end the inquiry here; domestic conflicts can have a significant effect on all classes of treaties by altering other circumstances necessary to the performance of the treaty in the county host to the domestic hostilities, or even neighbouring countries.[516] For example, A. Graham argued that if two countries

> "enter into a treaty for the sale of hydro-electric power and the generating plants have since fallen into the hands of the insurgents, then, there may be grounds for invoking *Rebus Sic Stantibus*.
>
> "The more difficult problem will arise where the treaty is not directly but only indirectly affected by the revolution. For example, if [countries] A and B agree to aid each other in case of attack by a foreign power and A is using all its military strength to fight a revolution at home, is this sufficient grounds for repudiation of the treaty? It would form a very strong argument for A if it were to claim that the treaty presupposed that it would have a surplus of military strength and the existence of a revolutionary situation at home had materially altered that fact."[517]

148. Thus, domestic hostilities can operate in much the same way as international conflict, affecting the whole gamut of treaty types discussed in section III. Graham proceeded to consider the doctrine of *rebus sic stantibus* in relation to domestic hostilities in much the same way it is considered in section VI.A above in relation to international conflicts.

149. Several concrete examples of the effect of domestic conflicts exist. First, Bernard Firestone notes that the civil war in Yemen had effects on the entire Middle East.[518] Second, Secretary-General Kurt Waldheim used his power under Article 99 of the United Nations Charter to raise the matter of the 1975 Lebanese civil war in the Security Council, arguing that "further deterioration in the Lebanese situation carried implications extending beyond that country's boundaries".[519] Although this reference is broad, it is possible that some of these implications included effects on treaties. Third, the Guinea-Bissau civil war caused the United States of America to

[514] See, e.g., *Law and Civil War in the Modern World* (J. N. Moore, ed. 1974); K. Suter, *An International Law of Guerrilla Warfare* (1984); Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 *Georgia Journal of International and Comparative Law* 253 (1983).

[515] After noting the increasing convergence of human rights law and IHL, see supra note 114, Reinhard Haßenpflug argues that this "fusion of human rights law and humanitarian law corresponds to the need to give as much protection as possible particularly to the victims of non-international armed and internal conflicts." Reinhard Haßenpflug, *Comment*, 45 *German Yearbook of International Law* 78 (2002). See also Theodor Meron, *Human Rights in Internal Strife: Their International Protection* (1987); Cesar Sepulveda, *Interrelationships in the Implementation and Enforcement of International Humanitarian Law and Human Rights Law*, Conference on International Humanitarian and Human Rights Law in Non-International Armed Conflicts, 12-13 April 1983, 33 *American University Law Review* 117 (1983); Hans-Peter Gasser, *International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion?* 45 *German Yearbook of International Law* 149 (2002).

[516] Graham, supra note 512, at 131 ("The incidents of civil war are highly analogous to those of a World War and in many respects the factual effects on contracts and treaties will be the same").

[517] Graham, supra note 512, at 137.

[518] Bernard Firestone, *The United Nations Under U. Thant*, 1961-71, at p. 28 (2001).

[519] James Daniel Ryan, *The United Nations Under Kurt Waldheim*, 1972-1981, at p. 75 (2001).

suspend its Peace Corps and programme in that country.[520] Fourth, the Netherlands suspended bilateral treaties with Suriname because of domestic hostilities occurring in Suriname in 1982.[521] Finally, domestic hostilities in the former Yugoslavia affected multiple treaties between Yugoslavia and several European countries.[522] There is thus little doubt that internal conflicts can have a significant effect on inter-State treaty relations.

C. The distinction between bilateral and multilateral treaties

150. In discussing the effect of armed conflict on treaties, commentators have attempted to distinguish between bilateral treaties, as more susceptible to suspension or abrogation, and multilateral treaties, as more resilient. For example, C. W. Jenks argued that "[i]t is now generally admitted that war has not the same effect on multilateral legislative treaties as upon bilateral contractual ones."[523] Similarly, Robert Tucker argued that:

> "In considering the effects of war on treaties it is useful, and probably necessary, to distinguish between those treaties having a large number of states other than the belligerents as parties and bilateral treaties having as signatories only the belligerents. With respect to the latter category, recent practice appears to indicate that, apart from those treaties especially intended to operate in time of war, the outbreak of war has the effect of annulling them. Even in the case of those bilateral treaties intended to establish a permanent condition of things, there is nothing to prevent a victorious belligerent from dissolving them in the peace treaty. With respect to the former category, however, the outbreak of war cannot be seen to result in the abrogation of treaties that include as parties states not participating in war (for example, the treaty establishing the International Postal Union, the safety of navigation at sea, etc.). Such multilateral treaties remain binding not only between those states not participating in war but between the belligerents and the non-participants. Between the belligerents, they may be suspended in whole or in part as the necessities of war require."[524]

151. In the practice of States, however, this neat dichotomy between bilateral and multilateral treaties appears to be diminishing, as evidenced by a comparison of the peace treaties of the Second World War with those following the First World War:

> "The language of the 1947 and 1951 treaties apparently reflects the increasing tendency to regard most treaties as surviving the outbreak of war. That is certainly true with respect to a number of bilateral treaties. After World War II the wording of the article for the revival of bilateral treaties was changed so as to include either the phrase 'keep in force or revive' or the phrase 'continue in force or revive' rather than just 'revive' as was the case in the peace treaties after World War I. Also, where the World War I peace treaties had stated that unrevived treaties 'are and shall remain abrogated', the World War II peace

[520] See *supra*, para. 110.
[521] See *supra*, para. 90.
[522] See *supra*, paras. 113-112.
[523] C. W. Jenks, *State Succession in Respect of Law-Making Treaties*, 29 *British Yearbook of International Law* 105, 120 (1952).
[524] Tucker, *supra* note 29, at 501.

treaties stated that treaties and the subject of notification "shall be regarded as abrogated".[525]

152. Thus, although following both World Wars multilateral treaties were still viewed as more resilient than bilateral ones,[526] an increased resilience of bilateral treaties was acknowledged. This trend seems to have continued. Rather than adopting the former multilateral/bilateral distinction, several modern commentaries on the effect of armed conflict on treaties adopt a more nuanced approach, looking to the actual subject matter of the treaty rather than the number of parties.[527] This approach shows that although many of the most resilient treaties are multilateral, one cannot assume that a multilateral treaty will always be more likely than a bilateral treaty to withstand armed conflict. For example, a bilateral treaty establishing a permanent regime could prove more resilient than a multilateral environmental treaty which is inconsistent with the principle of proportionality. Similarly, a bilateral treaty on reciprocal inheritance rights could easily prove more resilient than a multilateral extradition treaty which conflicts with national policy of the armed conflict. A thorough classification scheme is thus superior to generalizations about treaties based on the number of parties to them.

D. Separability of particular articles

153. Under the general law of treaties as codified in the Vienna Convention, article 44,[528] treaty suspension or termination applies only to the treaty as a whole, "unless the treaty provides or the parties agree otherwise".[529] An exception is made with respect to grounds for termination or suspension that relate to particular clauses, but only if "the said clauses are separable from the remainder of the treaty with regard to their application, ... those clauses [are] not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole and continued

[525] McNair, *supra* note 7, at 552-53 (noting that "there is no way of knowing for sure whether the abrogation took place at the time of the outbreak of war, the time of entry into force of the treaty of peace, or at the end of the period within which revival was permitted"). See also Ibid. at 549.

[526] *E.g.* P. D'Oyly Cunliffe writes that at the conclusion of both World Wars "[t]he general principle has been to regard all bilateral treaties as abrogated save such of them as each of the Allied Powers notifies the defeated signatory it wish to continue in force or revive ... [whereas] multilateral conventions remain unaffected by war except in so far as the belligerents may suspend their execution in relation to themselves if the necessities of war compel them so to do." D'Oyly Cunliffe, *supra* note 241, at 429.

[527] See, *e.g.* the 1982 approach of Delbrück, *supra* note 6, and the 1961 approach of McNair, *supra* note 36. Similarly, the IDI resolution makes no distinction between the effect of armed conflict on a bilateral treaty between a belligerent and a neutral and the effect of armed conflict on a multilateral treaty between belligerents and neutrals. IDI resolution, *supra* note 19, at art. 5.

[528] Vienna Convention on the Law of Treaties, *supra* note 1, at art. 44. The exception, stated in art. 44(3), states that if the grounds for termination or suspension "relates solely to particular clauses, it may be invoked only with respect to those clauses where (a) the said clauses are separable from the remainder of the treaty with regard to their application, (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and (c) continued performance of the remainder of the treaty would not be unjust". Ibid. at art. 44(3).

[529] Aust, *supra* note 29, at 248.

performance of the remainder of the treaty would not be unjust."[244] One commentator has noted that "[s]ince 'these three conditions are cumulative', the principle of the integrity of the treaty overwhelmingly prevails in case of a fundamental change of circumstances."[245] Similarly, Aust commented in his recent treatise on treaties that the second condition alone would be quite difficult to meet "and would require an examination of the subject matter of the clauses, their relationship to the other clauses, and perhaps also the purpose and the circumstances of the conclusion of the treaty."[246]

154. Since in accordance with article 73 of the Vienna Convention, the Convention "shall not prejudge any question that may arise in regard to a treaty from ... the outbreak of hostilities between States",[247] the question arises as to what extent the separability doctrine established in article 44 of the Convention holds true, influenced by the principle of *pacta sunt servanda*. It appears that courts and commentators examining the question of the effect of armed conflict on treaties have been more willing to allow separability of treaty provisions than the framers of the Vienna Convention. For example, McNair reports that in the Second World War

> "the practice of the United States accepts the separability of the articles of a treaty unless they form part of an indissoluble whole which depends for its validity upon the continued operation of each of its components. This principle is now widely accepted by text writers as well as practitioners, and differs sharply from the view earlier held by writers such as Vattel. The recent practice of the executive and the courts indicates that the principle of separability may be carried even one step further than where the particular parts of a specific article are not closely interdependent, it is possible to consider the effect of war on the individual parts."[248]

155. Similarly, in the landmark United States decision on the effect of armed conflict on treaties *Techt v. Hughes*, Judge Cardozo stated:

> "It is not for them to determine treaties generally, or bits. Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inoperative scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended or even

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[244] The full text of the exception states that if the ground for termination or suspension "relates solely to particular clauses, it may be invoked only with respect to those clauses where (a) the said clauses are separable from the remainder of the treaty with regard to their application; (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and (c) continued performance of the remainder of the treaty would not be unjust." Vienna Convention on the Law of Treaties, *supra* note 1, at 64–5).

[245] Elizabeth Zoller, [illegible] of the United States into the Rights of the Minorities, 77 American Journal of International Law 160, 167 (1983) (citing J. Sinclair, The Vienna Convention on the Law of Treaties 166 (1984)).

[246] Aust, *supra* note 28, at 249.

[247] Vienna Convention on the Law of Treaties, *supra* note 1, at art. 73.

[248] McNair, *supra* note 7, at 22.

[illegible] is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act."[1151]

[illegible] Although these two examples could merely embody an earlier understanding on separability of treaty provisions generally which has since evolved, or may only represent the view of one State, there is reason to believe they signify a greater willingness to sever treaties when the effect of armed conflict on treaties is concerned. In its commentary on what became article 44 of the Vienna Convention, the International Law Commission said:

> "The separability of treaty provisions was until comparatively recently considered almost exclusively in connexion with the right to terminate a treaty on the ground of a breach of the other party. Certain modern authorities, however, have advocated recognition of the principle of separability in determining the effect of war upon treaties. They have urged that in some cases one provision of a treaty may be struck out or suspended without necessarily disturbing the balance of the rights and obligations established by the other provisions of the treaty. These authorities cite in support of their contentions certain pronouncements of the Permanent Court of International Justice in regard to the interpretation of self-contained parts of treaties."[1152]

[illegible] It is thus possible that the separability of treaty provisions in the case of an effect of armed conflict on treaties is different from that found in general international law codified in the Vienna Convention. The opinions of States parties will be required to make this determination.

1. Length of treaty suspension

[illegible] Another question related to treaty suspension in the case of armed conflict is its length. In his analysis of the effects of the First World War on treaties, Jaffe considered a thorough review of this question. He concluded that although there existed a tendency towards complete resumption of suspended treaty obligations as soon as possible, the nature of the treaty was also a factor, whereas treaties of a technical nature will generally resume immediately, treaties whose drafting involved political bargaining [and] are to be revalued in the light of the changes brought about by the war and either modified or terminated."[1153] In his comprehensive analysis of the effect of the Second World War on treaties, McNair concluded that "[a]s a general rule suspended bipartite treaties did not appear to revive automatically with the cessation of hostilities. Most returned to full effectiveness as a result of a special agreement or revival action under the peace treaties, and usually the latter procedure was the one which was followed."[1154] Multilateral treaties did not require this express revival; when they were suspended at all, it is submitted that they automatically revived at the conclusion of the

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[1151] Kuhn, supra note 77, at 241 (followed for this proposition by the United States Supreme Court in Clark, supra note 88, at 566–[illegible]).

[1152] Report of the International Law Commission on the Work of the second part of its seventeenth session and on its eighteenth session (A/CN.4/Ser.A/1966/Rev.1) (1966), reprinted in [1966] 2 Yearbook of International Law Commission 169, 238 (A/CN.4/SER.A/1966/Add.1) (citing the *Free Zones* case, series A/B, No. 46, p. 140; the *SS Wimbledon* case, series A, No. 1, p. 24).

[1153] Jaffe, supra note 23, at 190–92.

[1154] McNair, supra note 7, at 710.

hostilities.[539] Thus, the general practice following the Second World War is that suspended multilateral treaties revive automatically after armed conflict, whereas suspended bilateral treaties require express renewal.[540]

159. Modern practice regarding the length of treaty suspension no longer focuses on the distinction between bilateral and multilateral treaties. Delbrück has written that "[t]he suspension will be considered to end, and treaty obligations to revive, at the earliest possible date after any such use of force has ended. the formal termination of the armed conflict not being a legal prerequisite to ending the suspension. It should be noted, however, that this forms a guiding principle for the States concerned rather than a hard and fast rule of international law."[541] The IDI resolution agreed with this result, declaring that "[a]t the end of an armed conflict and unless otherwise agreed, the operation of a treaty which has been suspended should be resumed as soon as possible."[542] Thus, whereas the number of parties to the treaty traditionally had a bearing on the length of treaty suspension in cases of armed conflict, modern practice avoids this distinction and aims for all treaties to resume as soon as possible following the close of hostilities.

VIII. Conclusion

160. Just as the effect of armed conflict on treaties has always been a difficult and uncertain area of international law, so it remains today. The present study has attempted a comprehensive categorization of treaties considering their ability to withstand traditional war, and in this effort quite a few trends can be identified. First, armed conflict will rarely if ever affect humanitarian law treaties, treaties with express provisions as to their applicability during armed conflict, treaties creating a permanent status or regime, treaty provisions codifying *jus cogens* norms, non-derogable human rights treaties, treaties governing intergovernmental debt and diplomatic conventions. Second, a smaller group of treaties exhibits a moderately high likelihood of applicability during armed conflict, including reciprocal inheritance treaties and multilateral "law-making" conventions. Third, a large group of treaties remains with an emerging, controversial or varied likelihood of applicability. This group includes international transport agreements; environmental treaties; extradition treaties; border-crossing treaties; treaties of friendship, commerce and navigation; intellectual property treaties; and penal transfer treaties.

[539] Ibid., at 30n. The peace treaties concluding the Second World War provide the prime example of this phenomenon. Whereas the provisions with regard to pre-war bilateral treaties in the Second World War peace treaties were similar to those at the conclusion of the First World War, requiring each revived bilateral treaty to be individually enumerated, "the treatment of prewar multilateral treaties was very different. Rather than list the multilateral treaties which were to be applied again by the former enemy powers as the World War I peace treaties had done, the 1947 treaties made no mention of the prewar multilateral treaties." Ibid. at 322. See also Sonnenfeld, supra note 265, at 109 ("As a rule multilateral treaties have been treated differently from bilateral ones, the former being considered as remaining in force, even though their implementation between the belligerent countries was suspended during the war, while the latter, in principle, have required revival by express legal action").

[540] Ibid. at 322-23. But see ibid. at 328 ("The experience of the peace treaties would seem to indicate that non-political or technical multilateral conventions do revive automatically, but it is not clear what happens to the political multilateral conventions").

[541] Delbrück, supra note 6, at 1371.

[542] IDI resolution, supra note 19, at art. 11.

Finally, two kinds of treaties have a decidedly low likelihood of applicability during armed conflict, namely, those treaties inapplicable through express provision and those treaties inapplicable in practice.

161. Yet, despite this seemingly neat set of rules, the question of the effect of armed conflict on treaties continues to be ridden with pitfalls. The norms stated above were generally developed in relation to traditional warfare, and it is unclear how relevant they will be in the new era of less formal, non-traditional and often domestic armed conflicts. These questions are complicated by the fact that courts and political departments often do not comment on the effect of a given armed conflict on treaties until significant time has passed, in some cases as much as 200 years.[94]

162. Even in this new and uncertain era, however, some trends can be identified. First, there is significant evidence that domestic hostilities in a given State can affect inter-State treaties between that State and another, or potentially even between two or more completely different States; other non-traditional forms of armed conflict have also been shown to affect treaties, such as the cold war and small bilateral conflicts. Second, although many other legal doctrines are substantially similar to the effect of armed conflict on treaties, a strong argument can be made that the latter is distinguishable on the basis that it occurs automatically, whereas doctrines such as *rebus sic stantibus* and impossibility must be invoked. Third, there is strong support for the proposition that operations carried out pursuant to Chapter VII of the United Nations Charter will suspend or abrogate inconsistent treaties. Finally, whereas it was traditionally understood that armed conflict had a greater effect on bilateral treaties than on multilateral treaties, there is strong evidence that this distinction has diminished.

163. One important policy consideration in the law governing the effect of armed conflict on treaties is the vital role of treaties in the system of international law and the time and effort necessary for their negotiation and adoption. From the perspective of international law, armed conflict is a disruption, for a limited period of time, of the normal situation, which is peace. Therefore, as a policy matter, there are advantages to trying to make treaties resistant to intermittent armed conflict and, when that cannot be achieved, treating the effect of war per se on treaties as suspensive rather than terminative so that the treaties can return quickly to operation upon the cessation of armed conflict.

164. In conclusion, although significant State practice and doctrine exist, they are inconsistent and in flux. As traditional warfare gives way to modern non-traditional, domestic or informal armed conflicts, the parameters of the effect of armed conflict on treaties are left in a considerable state of uncertainty. With input from States as to current governmental views, codification could greatly advance international understanding on the topic, and update a doctrine that has been written largely for another age.

[94] See *supra* note 12.

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